

"from the same fatal flaw"<sup>122</sup> described in *Dunn*. Indeed, it would appear that no durational residence requirement for voting is permissible unless it is tied to the closing of the voter registration period.<sup>123</sup> Even then, the reasonableness of the cutoff point for registration will be examined, and a registration period that closes fifty days prior to election "approaches the outer constitutional limits in this area."<sup>124</sup>

## VI. Contracts, Commercial Law, and Consumer Law

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### A. Conditions in Contracts

In *Blakley v. Currence*,<sup>1</sup> the Indiana Court of Appeals confronted a problem concerning loan or mortgage contingency clauses that may be common in real estate purchase transactions. The parties in that case entered into a sales agreement on May 19, 1973, by which they agreed to transfer an unfinished home for \$24,750. The agreement provided that the sale was contingent upon the buyer acquiring loan approval for part of the purchase price. Thereafter, in furtherance of the agreement, the buyer contacted five financial institutions in order to obtain financing for the purchase of the unfinished home along with financing for the construction work needed to complete the home.<sup>2</sup> Unfortunately, the buyer's application was rejected by each of these lenders. In one case, the lender preliminarily agreed to make the loan but refused final approval because the buyer could not arrange for a commitment from a reputable building contractor to complete the unfinished home.

In late June, the buyer notified the seller that he could not complete the transaction, and on July 6, the seller brought an action for

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<sup>122</sup>420 F. Supp. at 317. Like the Supreme Court in *Dunn*, 405 U.S. at 357, the court rejected the residence requirement "as a means of affording some surety that a voter will more likely exercise his right to vote more intelligently." 420 F. Supp. at 317.

<sup>123</sup>See *Marston v. Lewis*, 410 U.S. 679 (1973).

<sup>124</sup>*Burns v. Fortson*, 410 U.S. 686, 687 (1973).

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<sup>1</sup>361 N.E.2d 921 (Ind. Ct. App. 1977).

<sup>2</sup>The specific language of the agreement was not reprinted in the opinion. It is not clear, therefore, whether the condition involved acquiring a loan simply for the purchase price or for the purchase price plus an amount needed to complete the unfinished home. It is clear that it was the latter which the buyer sought in making a loan application at one of the lenders contacted. *Id.* at 922.

specific performance. In a bench trial, the court found for the seller and entered a judgment for money damages. The court of appeals reversed, holding that the language "subject to loan approval" created an express condition precedent to the obligation of the buyer to pay for the property. Unless the language of the agreement is clear on the subject, such a clause will not be interpreted "as if the word 'ability' was included,"<sup>3</sup> but will be read as a literal requirement for loan approval. Since the buyer did not obtain a loan, the condition was not fulfilled and the performance obligation was terminated.

Where a purchase contract is conditioned upon the buyer obtaining financing at specified rates, courts often impose a duty of good faith on the buyer in seeking loan approval.<sup>4</sup> Even if the buyer has failed to obtain a loan, he may be in breach because he did not pursue loan applications with reasonable effort.<sup>5</sup> The trial court's decision in the *Blakley* case could be viewed as a finding of bad faith on the part of the buyer in seeking loan approval. If the trial court did find bad faith, then the only grounds for reversal would be either (1) that no good faith requirement existed or (2) that the buyer acted in good faith despite the trial court's decision on this issue of fact. Neither point was addressed in the appellate court's opinion, thus leaving the good faith question in some doubt.<sup>6</sup>

### B. *Employee Discharge—Mitigation of Losses*

During the survey period the Indiana Court of Appeals returned to the question of the duty of an employee to mitigate losses after the employer's wrongful termination of an employment relationship. In *Seco Chemical, Inc. v. Stewart*,<sup>7</sup> the court of appeals reversed an award of damages that was computed by deducting the money that the plaintiff had earned in substitute employment from the total amount of plaintiff's salary for the employment period. The basis for the reversal was that a liquidated damages clause in the employment agreement—one that provided for the payment of full salary in the event of wrongful discharge—should have been enforced. However, as an alternative basis for decision the court intimated

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<sup>3</sup>*Id.* at 923.

<sup>4</sup>*See Fry v. George Elkins Realty Co.*, 162 Cal. App. 2d 256, 327 P.2d 905 (1958). For a general discussion of the problem, see Annot., 78 A.L.R.3d (1977).

<sup>5</sup>One way to avoid this problem is to provide in the agreement that the seller will have a reasonable period in which to obtain loan approval for the buyer after the buyer has failed and the mortgage contingency period has expired.

<sup>6</sup>The seller argued the issue of lack of good faith. 361 N.E.2d at 922.

<sup>7</sup>349 N.E.2d 733 (Ind. Ct. App. 1976). See Bepko, *Contracts and Commercial Law*, 1976 *Survey of Recent Developments in Indiana Law*, 10 IND. L. REV. 152, 169 (1976).

that there was no obligation to mitigate damages in such a case. The court suggested that the employee was not obligated to accept employment of a substantially different character, or grade, and since the alternate employment was not of that character, recovery "should not have included a consideration of what [the employee] . . . earned—or could have earned"<sup>8</sup> during the employment period.

This latter dicta may be in conflict with much of the literature on the subject,<sup>9</sup> and may also be inconsistent with the opinion of the Second District Court of Appeals in *Indiana State Symphony Society, Inc. v. Ziedonis*.<sup>10</sup> In *Ziedonis*, the discharged employee was a musician in the Indiana State Symphony who sued the symphony for the salary due under the contract for the remainder of the employment term, \$6,335. In the course of the trial, the discharged employee admitted to having obtained substitute employment in an orchestra in another city during a portion of the employment period and having been paid fees of \$3,430. The trial court awarded the employee the entire \$6,335, but the court of appeals reversed, indicating that the trial court should have deducted an amount that represented the plaintiff's earnings in the substitute employment. In the course of his concurring opinion, Judge Buchanan stated, "When a discharged employee obtains alternate employment, there is no question that the proper measure of his damages is the amount of compensation agreed upon for the remainder of the contract period involved, less the amount which he earns from other employment."<sup>11</sup> Furthermore, the employee's failure to offer testimony as to his expenses incurred in earning the \$3,430 prevented him from deducting those expenses from his earnings in the substitute employment before deducting the substitute earnings from the salary due in the employment period.<sup>12</sup>

### C. Employee Bonus Plans—Consideration

In *Spickelmier Industries, Inc. v. Passander*,<sup>13</sup> the Indiana Court of Appeals addressed a question concerning the right to recover a bonus that had been promised to an employee but which was not a part of the existing employment contract. On December 29, 1971, the board of directors of the defendant-employer determined that a bonus should be paid to five employees for their loyalty during 1971.

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<sup>8</sup>349 N.E.2d at 741.

<sup>9</sup>11 W. JAEGER, WILLISTON ON CONTRACTS § 1358 (3rd ed. 1968); J. CALAMARI & J. PERILLO, CONTRACTS § 14 (2d ed. 1977).

<sup>10</sup>359 N.E.2d 253 (Ind. Ct. App. 1976).

<sup>11</sup>*Id.* at 257.

<sup>12</sup>*Id.*

<sup>13</sup>359 N.E.2d 563 (Ind. Ct. App. 1977).

According to the plan, the plaintiff, Passander, was to receive a bonus of \$1,500. Shortly thereafter, the executive committee of the defendant-employer discovered that company profits were lower than anticipated and recommended that the bonuses not be paid. However, the chairman of the board refused to abandon the plan and negotiated a compromise with the board whereby one-half of the original "bonus would be paid as planned, with the balance to be paid when and if sufficient funds were available."<sup>14</sup> Apparently Passander knew of these matters, consented to the compromise, and accepted one-half of the \$1,500 bonus. Later in 1972, Passander resigned, never having been paid the other half of the \$1,500 bonus. He sued the employer, and the trial court entered a judgment for \$750, the amount due on the promised bonus.

The court of appeals held that the promise to pay the remainder of the bonus was not enforceable. It stated that there was no consideration for the promise since the promise to pay the remainder of the bonus was not part of any agreed exchange between the parties. The court did not discuss the principle found in section 90 of the *Restatement (Second) of Contracts*, which provides: "A promise which the promisor should reasonably expect to induce . . . forbearance on the part of the promisee . . . and which does induce such . . . forbearance is binding"<sup>15</sup> even though the forbearance is not a part of an agreed exchange. In the *Spickelmier* case, if Passander had relied on the promise and declined other employment opportunities, there would seem to be a basis for the trial court's decision that the promise to pay the second half of the bonus was enforceable. However, Passander had apparently not alleged or proved any specific reliance on the promise. The court took careful note of this fact and described it as "a fatal omission."<sup>16</sup>

#### *D. Wholesaler Termination—Proof of Existence of an Agreement*

In *Jos. Schlitz Brewing Co. v. Central Beverage Co.*,<sup>17</sup> the Indiana Court of Appeals was asked to affirm a judgment in favor of a wholesaler of beer against the manufacturer under Indiana Code section 7-2-1-23(a)(2).<sup>18</sup> This statute provides that it is unlawful "unfairly, without due regard to the equities of such wholesaler . . . and without just cause or provocation, to cancel or terminate any agreement or contract . . . for the sale of alcoholic malt beverages."<sup>19</sup> One

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<sup>14</sup>*Id.* at 564.

<sup>15</sup>RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1973).

<sup>16</sup>359 N.E.2d at 566 n.3.

<sup>17</sup>359 N.E.2d 566 (Ind. Ct. App. 1977).

<sup>18</sup>IND. CODE § 7-2-1-23(a)(2) (1976).

<sup>19</sup>*Id.*

ground for reversal offered by the manufacturer was that there was no "agreement or contract" between the manufacturer and wholesaler and thus there could be no wrongful termination within the meaning of the statute.

The relationship between the manufacturer (Schlitz) and the wholesaler (Central) was predicated on a "declaration of terms" executed on August 29, 1966. This declaration of terms stated: "The relationship between the parties is exclusively that of Buyer and Seller, and may be terminated by either party at any time, without cause and without notice."<sup>20</sup> It also provided: "Buyer acknowledges that Seller has granted no franchise or exclusive territory to Buyer and Seller may at any time without incurring any liability to Buyer sell its products to others in the same trade area as Buyer . . . ."<sup>21</sup> Central had been distributing Schlitz products since 1934 and during that time had engaged in various types of promotional and distribution work on behalf of Schlitz. The event that precipitated the August 29, 1966, declaration of terms was a change in Central's organic structure from a partnership to an Indiana corporation in June 1966.

On appeal, Schlitz argued that the declaration of terms embodied the relationship between Schlitz and Central and that it did not constitute a contract or agreement. The court of appeals agreed with this latter point since the declaration of terms appeared to be illusory. However, the appellate court held that the trial court could have found an agreement from the other circumstances and did not have to rely exclusively on the declaration of terms. The court cited Uniform Commercial Code section 2-204, as codified in the Indiana Code, which states that "a contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract."<sup>22</sup> The court referred to the continuous conduct on the part of Central, its predecessor partnership, and Schlitz as being sufficient to permit the trial court to find a contract or agreement. This included a recognition that there were certain obligations such as: Central's acceptance and dissemination of Schlitz advertising, Central's continuous efforts to secure greater distribution of Schlitz products and better position on retail shelves and coolers, Central's continuous efforts to sell and install special displays and promotions, Central's efforts to introduce new Schlitz products, Central's efforts to develop the college market, Central's consultation with Schlitz representatives concerning the sales and marketing of Schlitz products, Central's use of Schlitz forms in ordering products and making market

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<sup>20</sup>359 N.E.2d at 569.

<sup>21</sup>*Id.*

<sup>22</sup>IND. CODE § 26-1-2-204 (1976).

reports, and Central's efforts to follow Schlitz's policy in keeping fresh beer in retail outlets. Finally, at a meeting just prior to the termination of Central, the Schlitz corporate counsel asked Central to voluntarily withdraw from the relationship. When Central refused, Schlitz gave Central formal notice of termination rather than simply refusing to supply beer, which Schlitz seemed to have had power to do under the declaration of terms. The request for a resignation and the formal notice of termination suggest that Schlitz understood there was a permanent binding contract or agreement between the parties. Since the trial court was justified in finding an agreement or contract, despite the declaration of terms, the trial court's judgment under the statute was upheld as proper.

### *E. Punitive Damages*

The Indiana Supreme Court again granted transfer in a case in which a trial court had awarded punitive damages in a contract action. In *Hibschman Pontiac, Inc. v. Batchelor*,<sup>23</sup> the supreme court reversed the Indiana Court of Appeals and affirmed a trial court conclusion that punitive damages were permissible. The court said that there was sufficient evidence of tortious conduct where "the jury could reasonably have found elements of fraud, malice, gross negligence or oppression mingled into the breach of warranty."<sup>24</sup> There was also evidence to suggest that the public interest would be served by the deterrent effect of the punitive damages. Thus, both tests set forth earlier by the supreme court were met in the *Hibschman* case, and the punitive damage award was appropriate.<sup>25</sup>

Despite the justification for the award of punitive damages in *Hibschman*, the supreme court concluded that the trial court award could not be affirmed. The jury had awarded \$1,500 actual damages and \$15,000 punitive damages, but the supreme court found this to be excessive, applying a "first blush" rule, which suggests that punitive damages should not be awarded if "at first blush they appear to be outrageous and excessive."<sup>26</sup> In this case, the court

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<sup>23</sup>362 N.E.2d 845 (Ind. 1977). The court of appeals decision was discussed in Bepko, *Contracts and Commercial Law, 1976 Survey of Recent Developments in Indiana Law*, 10 IND. L. REV. 151, 161-64 (1976). The reversal of the court of appeals decision was anticipated there.

<sup>24</sup>362 N.E.2d at 848.

<sup>25</sup>See *Vernon Fire & Cas. Ins. Co. v. Sharp*, 349 N.E.2d 173 (Ind. 1976), where the court concluded that if the conduct was an independent tort or was tortious in nature but did not conveniently fit the confines of a tort, and if the court found that the public interest would be served by the deterrent effect punitive damages provide, then the award of punitive damages in a contract action would be proper.

<sup>26</sup>362 N.E.2d at 849 (quoting *City of Indianapolis v. Stokes*, 182 Ind. 31, 35, 105 N.E. 477, 479 (1914)).

thought that \$15,000 punitive damages were so high as to violate the first blush rule. Thus, the court ordered a remitter of \$7,500 of the punitive damages. Justice DeBruler concurred in the result but expressed concern that the first blush rule is too vague and urged adoption of a standard of review of punitive damage awards that contains objective limitations.<sup>27</sup>

The Indiana Court of Appeals also affirmed a punitive damage award in *Jos. Schlitz Brewing Co. v. Central Beverage Co.*,<sup>28</sup> discussed above. In that case, Schlitz, the manufacturer, noted that Central, its distributor, had failed to adopt and implement certain "internal controls" designed by Schlitz and as a result, rated the wholesaler unsatisfactory. After some negotiation and disagreement over the need for these internal controls, Schlitz mailed a termination letter to the wholesaler. Apparently Schlitz had not taken any similar action against other wholesalers who had failed to implement these internal controls, and Central was rated by other breweries as a first class wholesaler with good internal practices and record keeping. In addition, there was evidence that Central's termination was in furtherance of a Schlitz plan to reduce the number of distributors in Indiana.

The trial court awarded punitive damages, and the court of appeals affirmed, holding that Schlitz's conduct in attempting to inflict internal controls on Central amounted to oppressive conduct, tortious in nature, as that expression has been defined in Indiana decisions on punitive damages.<sup>29</sup> The trial court also found that the real purpose of Schlitz's action in terminating its agreement with Central was to consolidate the number of Schlitz beer wholesalers in Indiana. The court of appeals agreed: "This conduct on the part of Schlitz may properly be viewed as an exhibition of bad faith toward the rights of its wholesalers."<sup>30</sup> The appellate court also found that there was sufficient public interest to justify a punitive damage award; apparently such an award would deter beer manufacturers from acting in this oppressive manner with respect to wholesalers.

The award in *Schlitz* included \$50,000 punitive damages and \$1,661 compensatory damages. The defendant argued that the punitive damage award was excessive, and the court of appeals, without the benefit of the supreme court's subsequent opinion in *Hibschman*, affirmed on the ground that the amount of a punitive damage award is within the sound discretion of the trial court and

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<sup>27</sup>*Id.* at 849.

<sup>28</sup>359 N.E.2d 566 (Ind. Ct. App. 1977). See text accompanying note 17 *supra*.

<sup>29</sup>*Id.* at 580.

<sup>30</sup>*Id.*

should only be overturned if it appears to be a "result of passion or prejudice."<sup>31</sup>

The \$50,000 award in *Schlitz* was more than three times the \$15,000 award in *Hibschman*, which was rejected as excessive by the supreme court. At the same time, the compensatory damages in *Schlitz* (\$1,661) were only slightly higher than the compensatory damages in *Hibschman* (\$1,500). Even though the ratio of punitive damages to compensatory damages is much higher in *Schlitz* than in *Hibschman*, there may be justification for the court of appeals decision. First, it is not clear that this ratio should be controlling.<sup>32</sup> Second, the deterrence in *Schlitz* may require a larger award since Schlitz is a national organization, the second largest brewery in the United States with annual profits in the millions of dollars. Finally, the *Hibschman* award was produced by a jury, which perhaps is open to more rigorous scrutiny on emotional issues such as punitive damage awards than is a judgment in a bench trial such as in *Schlitz*.

#### F. Parol Evidence Rule

The Indiana Court of Appeals had an opportunity to comment twice on the operation of the parol evidence rule during the survey period. First, in *Board of Directors, Ben Davis Conservancy District v. Cloverleaf Farms, Inc.*,<sup>33</sup> the court dealt with a parol evidence rule question in connection with a contract between a grantor and a grantee of an easement. The court suggested that the intention of the parties at the time of the making of the contract is to be derived from the language used in the instrument unless there is an ambiguity. The test for determining whether an instrument is ambiguous is whether reasonable men would find it subject to more than one interpretation. Secondly, earlier in the year in *Warrick Beverage Corp. v. Miller Brewing Co.*,<sup>34</sup> the court of appeals dealt with the parol evidence rule found in the Uniform Commercial Code (U.C.C.).<sup>35</sup> The *Warrick* court acknowledged that parol evidence, consisting of course of dealing<sup>36</sup> and usages of trade,<sup>37</sup> would be admissible not only in cases of ambiguity in the writing but in all cases, unless the evidence contradicted the terms of the writing. This is consistent with the view of the draftsmen of the U.C.C. who stated in the official comments to section 2-202 that it was their intention to reject any require-

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<sup>31</sup>*Id.* at 581.

<sup>32</sup>The court of appeals emphasized this point. *Id.*

<sup>33</sup>359 N.E.2d 546 (Ind. Ct. App. 1977).

<sup>34</sup>352 N.E.2d 496 (Ind. Ct. App. 1976).

<sup>35</sup>IND. CODE § 26-1-2-202 (1976).

<sup>36</sup>*Id.* § 26-1-1-205(1).

<sup>37</sup>*Id.* § 26-1-1-205(2).

ment that "a condition precedent to the admissibility of the type of evidence" suggested above (course of dealing and usage of trade) "is an original determination by the court that the language used is ambiguous."<sup>38</sup> Thus, the standards for determining the admissibility of certain types of parol evidence will differ depending on the context. If the contract is something other than a transaction in goods,<sup>39</sup> parol evidence will only be admissible if the court finds that there is an ambiguity in the writing. If the contract involves a transaction in goods, then certain types of parol evidence, such as course of performance, course of dealing, and usage of trade, will be admissible even though there is no ambiguity. However, the evidence of course of performance, course of dealing, or usage of trade will not be admissible if it contradicts the express language of the writing.

Although these standards are formulated differently, there may be some similarity in the analysis. For example, one court might refuse to admit evidence of course of dealing or usage of trade on the ground that there is no ambiguity in the writing. Another court might conclude that no ambiguity is necessary as a prerequisite to the introduction of this evidence, but that in the case in question the language of the writing is clear and the evidence of course of dealing and usage of trade would contradict the writing.

It is clear that the U.C.C. draftsmen considered the possibility that evidence of course of performance, course of dealing, or usage of trade could contradict the express terms in a writing.<sup>40</sup> It is also clear that in the event of this conflict, the express written terms are to control.<sup>41</sup> It is not clear if the issue of whether evidence of course of dealing or usage of trade contradicts the writing is for the trial court, as part of its parol evidence rule determinations, or whether these questions should be resolved by a jury on proper instructions.

### G. Discharge of Sureties

In *Bowyer v. Clark Equipment Co.*,<sup>42</sup> the Indiana Court of Appeals was asked to determine if the failure to give notice of default to a surety would discharge the surety from his obligation on a guarantee. In that case, the defendant-surety, Bowyer, signed a guarantee for the obligations of Emry, the principal, so that Emry could obtain a dealership from Clark, the creditor. The guarantee contained a provision which stated: "The undersigned hereby waive: . . . (3) Presentment for payment of any instrument of BOR-

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<sup>38</sup>U.C.C. § 2-202, Official Comment 1(c) (1972).

<sup>39</sup>IND. CODE § 26-1-2-102 (1976).

<sup>40</sup>See *id.* §§ 26-1-1-205(4), 26-1-2-208(2).

<sup>41</sup>*Id.*

<sup>42</sup>357 N.E.2d 290 (Ind. Ct. App. 1976).

ROWER or any other person, protest thereof, and notice of its dishonor to any party thereto and to the undersigned . . . .”<sup>43</sup> This guarantee was executed on November 1, 1970, and by June 1971, Emry was in default on his monthly account in the amount of \$25,000. In July 1971, Emry made up these arrearages and became current in his account. However, after July 1971, Emry was delinquent each month, and in July 1972, Clark determined that Emry was insolvent and could not pay any further indebtedness. It was at this time that Clark finally gave notice to Bowyer of the default and sued on the guarantee. The trial court entered a judgment in favor of Clark in the amount of \$41,522.20, and Bowyer appealed, claiming a discharge based on the failure of the creditor to give timely notice of default so the surety could pursue the principal.

The court of appeals held that where a guarantee is *absolute* no notice of default is necessary. An absolute guarantee is one where the obligation is in existence at the time of the creation of the guarantee contract and the guarantor knows the precise extent of the commitment being made. However, if “the guaranty is collateral and the liabilities guaranteed have not been created and are uncertain in amount, the creditor is required to give notice of the principal’s default.”<sup>44</sup> In this case, Bowyer was making a collateral guarantee since at the time the guarantee contract was made, Emry had not yet incorporated and the liabilities to Clark “were unknown, indefinite and no specified payment date was established.”<sup>45</sup> Thus, there was a requirement that notice of default be given to the surety.

Even though, in general, there is a requirement of notice of default in a case such as *Bowyer*, the court still had to determine the impact of the provision quoted above, which waived presentment, protest, and notice of dishonor. The court held that this language, which seems related to the waiver described in U.C.C. section 3-511(2)(a),<sup>46</sup> concerned only obligations with respect to presentment and default on negotiable instruments. The language did not deal with the obligation to give notice of default in a guarantee of a continuing account and therefore did not relieve Clark of the obligation to give notice.

Finally, in deciding the consequence of Clark’s failure to give notice, the court developed a two-step analysis. First of all, where

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<sup>43</sup>*Id.* at 292.

<sup>44</sup>*Id.* at 293. This seems to be a commonly held view. See L. SIMPSON, HANDBOOK ON SURETYSHIP 166-68 (1950). *But see* RESTATEMENT OF SECURITY § 136 (1941) (unless otherwise agreed, surety’s obligation to creditor is unaffected by creditor’s failure to notify surety of principal’s default).

<sup>45</sup>357 N.E.2d at 293.

<sup>46</sup>IND. CODE § 26-1-3-511(2)(a) (1976).

the creditor fails to give notice, the surety is "discharged to the extent of his injury."<sup>47</sup> Secondly, if "at the time of default the principal is solvent and . . . later becomes insolvent before notice is given, the guarantor is totally discharged."<sup>48</sup> This analysis may raise some questions. If in the first part of the court's analysis the surety is to be discharged to the extent of his injury, a question is raised as to what injury may exist if the principal has remained solvent. If the principal has more assets than liabilities and is paying obligations as they come due,<sup>49</sup> it is difficult to see how the surety would be injured by the failure to give notice. On the other hand, the fact that the principal has become insolvent does not mean that the surety's loss will be total. Insolvency is not necessarily a permanent condition, and even if it results in the dissolution of the principal, the surety's loss may not be total. This conclusion may be related to the principle known as *strictissimi juris*, which provides that sureties may be discharged altogether, without proof of injury, for such creditor misconduct as collateral impairment or release of the principal.<sup>50</sup> In any case, the *Bowyer* court concluded that the surety was totally discharged since the principal had become insolvent during the delay period.

#### H. Holder in Due Course

In *Western State Bank v. First Union Bank & Trust Co.*,<sup>51</sup> the Indiana Court of Appeals had an opportunity to comment on the burden of proof for establishing holder in due course status with respect to a negotiable instrument. The court acknowledged that once the defendant in an action on an instrument raises a defense, the burden of establishing holder in due course status generally falls on the party asserting the status.<sup>52</sup> This means that the party asserting holder in due course status has the burden of persuading the triers of fact that the existence of the fact is more probable than its nonexistence.<sup>53</sup> However, the court concluded there are some matters with respect to which the defendant might bear the burden of proof. For example, the defendant might urge that the instrument

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<sup>47</sup>357 N.E.2d at 294.

<sup>48</sup>*Id.*

<sup>49</sup>There are two definitions commonly offered for the term "insolvent." First, a debtor is insolvent in the "equity" sense when the debtor has not or cannot pay his bills as they come due. Second, a debtor is insolvent in the "bankruptcy" sense when the aggregate of his property is not sufficient to pay debts. See IND. CODE § 26-1-1-201 (23) (1976).

<sup>50</sup>RESTATEMENT OF SECURITY § 128 (1941).

<sup>51</sup>360 N.E.2d 254 (Ind. Ct. App. 1977).

<sup>52</sup>IND. CODE § 26-1-3-307(3) (1976).

<sup>53</sup>*Id.* § 26-1-1-201(8).

was irregular because it was inconsistent with some relevant custom or usage. If the instrument was irregular, a purchaser would have notice of a defect and could not be a holder in due course. In a case such as this, despite the general policy of requiring the holder to establish status, the defendant would bear the burden of establishing the existence of the custom. According to the court, this reasoning will avoid a requirement that the holder "prove that the contract terms . . . did not deviate from any custom or usage"<sup>54</sup> with all of the "difficulties which attend proving a negative."<sup>55</sup>

### I. Debt Collection Practices

On March 20, 1978, the Fair Debt Collection Practices Act (FDCPA) will become effective.<sup>56</sup> This new law adds another title to the Federal Consumer Credit Protection Act<sup>57</sup> and establishes new comprehensive restrictions on the activities of persons engaged in the business of debt collection. In creating these restrictions, Congress found that abusive debt collection practices "contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy."<sup>58</sup> The Senate Committee on Banking, Housing, and Urban Affairs, which held hearings on the new law, found that the widespread national problem of collection abuse included "obscene or profane language, threats of violence, telephone calls at unreasonable hours, misrepresentation of a consumer's legal rights, disclosing a consumer's personal affairs to friends, neighbors, or an employer, obtaining information about a consumer through false pretense, impersonating public officials and attorneys, and simulating legal process."<sup>59</sup> These problems have been magnified by the fact that there are more than 5,000 collection agencies in the United States, each averaging eight employees, and there were more than five billion dollars in debts turned over to these agencies in 1976.<sup>60</sup> Finally, there seemed to be universal agreement that only a very small percentage of consumers defaulted because of a willful or indifferent refusal to pay debts; the vast majority of consumers in default were the victims of unforeseen events such as unemployment, overextension, serious illness, marital dif-

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<sup>54</sup>360 N.E.2d at 258.

<sup>55</sup>*Id.*

<sup>56</sup>Fair Debt Collection Practices Act, Pub. L. No. 95-109, § 818, 91 Stat. 874 (1977).

<sup>57</sup>15 U.S.C. §§ 1601-1691 (Supp. V 1975).

<sup>58</sup>Fair Debt Collection Practices Act, Pub. L. No. 95-109, § 802(a), 91 Stat. 874 (1977).

<sup>59</sup>S. REP. NO. 382, 95th Cong., 1st Sess. 2 (1977), reprinted in [1977] U.S. CODE CONG. & AD. NEWS 2967-68 [hereinafter cited as 1977 S. REP].

<sup>60</sup>*Id.*

ficulties, or divorce.<sup>61</sup> The new law addresses these problems, and its purpose is to eliminate abusive debt collection practices by debt collectors and to insure that those debt collectors who refrain from using abusive practices are not put at a competitive disadvantage.<sup>62</sup>

In order to understand the scope of the new law, it is necessary to examine the definition of the expression "debt collector." This expression has been used to bring the FDCPA's focus on independent debt collectors who have been considered the primary practitioners of egregious collection practices. Implicit in the new law is an assumption that creditors collecting their own past due accounts would be restrained by the desire to protect their image.<sup>63</sup> Under the FDCPA, this expression describes any person "who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another."<sup>64</sup> The expression also includes "any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts."<sup>65</sup> Specifically excluded from the scope of the definition are: employees of a creditor acting in the name of a creditor, officers or employees of government agencies collecting debts in their official capacities, persons attempting to serve legal process, nonprofit organizations which perform bona fide consumer credit counseling services, attorneys collecting debts on behalf of clients, collection of debts incidental to a bona fide fiduciary obligation such as collection by a trust department of a bank, collection of debts not in default at the time obtained, or collection of debts, such as student loans, originated by the person collecting.<sup>66</sup>

Those persons included in the definition of "debt collectors" are prohibited by the Act from engaging in various types of collection practices. These restrictions and the prohibited practices will be

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<sup>61</sup>*Id.* at 3, reprinted in [1977] U.S. CODE CONG. & AD. NEWS at 2969.

<sup>62</sup>The courts have not developed much protection by way of private civil remedies for consumers who are subjected to aggressive collection techniques. See Note, *Debt Collection Practices: Remedies for Abuse*, 10 B.C. INDUS. & COM. L. REV. 698 (1969). There has been some legislation to regulate debt collection agencies, but the protection afforded consumers has been minimal. See, e.g., the Indiana collection agency license law, which seems directed at protecting creditors from abuses by collection agencies rather than protecting consumers. IND. CODE § 25-11-1-1 (1976).

<sup>63</sup>1977 S. REP., *supra* note 59, at 2, reprinted in [1977] U.S. CODE CONG. & AD. NEWS at 2968.

<sup>64</sup>Fair Debt Collection Practices Act, Pub. L. No. 95-109, § 803(6), 91 Stat. 874 (1977).

<sup>65</sup>*Id.*

<sup>66</sup>*Id.*

described below in two parts. The first part will deal with contacts between the debt collector and the consumer. The second part will deal with contacts between the debt collector and third persons. Finally, there will be a brief discussion of the remedies and penalties provided for violation of the new law.

1. *Debt Collector and Debtor.*—In general, unless the debt collector receives prior consent of the consumer, he may not communicate with a consumer<sup>67</sup> at any unusual time or place or at a time or place that should be known to be inconvenient for the consumer. Unless there is some reason to believe otherwise, a convenient time for communication is, by definition, between 8:00 a.m. and 9:00 p.m., local time.<sup>68</sup> The debt collector may not communicate with a consumer if he knows the consumer is represented by an attorney with regard to the debt in question. Of course, if the attorney fails to respond within a reasonable period of time, cannot be located, or consents to direct communication with a consumer, this restriction does not apply.<sup>69</sup> Finally, if the debt collector has reason to know that the consumer's employer prohibits contact by creditors with employees, the debt collector may not contact the consumer at the consumer's place of employment.<sup>70</sup>

In an effort to avoid problems of mistaken identity or collection efforts on an account already paid, the FDCPA also creates a procedure for validating the debt at the outset of communication between the debt collector and consumer.<sup>71</sup> Unless the information is contained in the initial communication, the debt collector shall, within five days after the initial communication with the consumer, send the following: (1) A written notice of the amount of the debt; (2) the name of the creditor to whom the debt is owed; (3) a statement that unless the consumer disputes the validity of the debt within thirty days, the debt will be assumed to be valid; (4) a statement that if the consumer gives written notice of a dispute concerning the debt, the debt collector will verify its validity; and (5) a statement that upon written request within the thirty-day period the debt collector will furnish the name of the original creditor if different from the current creditor. Apparently most debt collectors already utilize some method of notification and, as a result, this notification procedure should not result in much extra expense or paperwork.<sup>72</sup> If the consumer gives written notice of a dispute or requests the name of the

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<sup>67</sup>*Id.* § 805(a).

<sup>68</sup>*Id.* § 805(a)(1).

<sup>69</sup>*Id.* § 805(a)(2).

<sup>70</sup>*Id.* § 805(a)(3).

<sup>71</sup>*Id.* § 809.

<sup>72</sup>See 1977 S. REP., *supra* note 59, at 4, reprinted in [1977] U.S. CODE CONG. & AD. NEWS at 2971.

original creditor within the thirty-day period, the debt collector must cease collection of the debt or any disputed portion until the debt collector verifies the debt or obtains the name of the original creditor and mails these to the consumer.<sup>73</sup> In this context, the consumer's failure to dispute the validity of the debt may not be construed as an admission of liability.<sup>74</sup>

If a consumer gives written notice of a refusal to pay a debt or of a desire that the debt collector cease further communication with the consumer, the debt collector may not engage in further communication unless such communication advises the consumer that further efforts to collect are being terminated. Additionally, the debt collector may notify the consumer that specified remedies, which are ordinarily invoked by collectors, may be utilized or that the debt collector intends to invoke a specified remedy.<sup>75</sup>

In the course of his work, a debt collector is prohibited from engaging "in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt." The FDCPA invites the courts to develop standards during the process of litigation that define "harassment."<sup>76</sup> However, the following activities are listed in the new law as acts of harassment: (1) The use or threat of violence or other criminal means; (2) the use of obscene or profane language; (3) the publication of a list of consumers who allegedly refuse to pay debts—"shame lists"; (4) the advertisement for sale of any debt to coerce payment; (5) repeated telephoning or engaging any person in telephone conversations repeatedly or continuously with intent to annoy, abuse, or harass; and (6) placement of calls without disclosure of the caller's identity.<sup>77</sup>

Debt collectors are also prohibited from making any false or misleading representation in connection with collection.<sup>78</sup> Examples of false or misleading representations set forth in section 807 of the FDCPA are: (1) false representation or implication that the collector is affiliated with a government entity, including using a badge or uniform;<sup>79</sup> (2) false representation of the character, amount, or status

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<sup>73</sup>Fair Debt Collection Practices Act, Pub. L. No. 95-109, § 809(b), 91 Stat. 874 (1977).

<sup>74</sup>*Id.* § 809(c).

<sup>75</sup>*Id.* § 805(c).

<sup>76</sup>*Id.* § 806.

<sup>77</sup>*Id.*

<sup>78</sup>*Id.* § 807.

<sup>79</sup>*Id.* § 807(1). This is similar to one of the FTC Guides Against Debt Collection Deception, which provides that "[a]n industry member shall not use any . . . insignia, . . . emblem, or any other means which creates a false impression that such industry member is connected with . . . an agency of government." 16 C.F.R. § 237.3 (1977).

of a debt; (3) false representation of compensation which may be lawfully received by a debt collector for collection work; (4) false representation that the collector is an attorney; (5) threats to take any action that cannot be legally taken or that is not intended; (6) representation that a sale or referral of the debt shall cause the consumer to lose claims or defenses; (7) false representation or implication that the consumer committed any crime; (8) a threat to communicate false information, including the failure to communicate that a disputed debt is, in fact, disputed; (9) use or distribution of written communications which falsely simulate government documents; (10) failure to disclose that the purpose of an inquiry is to collect a debt and that information will be used for that purpose; (11) use of any name other than the true name of the debt collector's business, company, or organization; (12) false representation that documents are or are not legal process forms, which do not require action by the consumer;<sup>80</sup> and (13) false representation that a collector is a consumer reporting agency.<sup>81</sup>

In addition to the restrictions on communications with a consumer, there are also certain unfair practices that are proscribed by the FDCPA. A "debt collector may not use unfair or unconscionable means to collect a debt";<sup>82</sup> the following examples are offered: (1) collection of any amount not authorized by the agreement or by law; (2) acceptance of a check postdated by more than five days, unless the drawer receives notice in writing of the intent to deposit or collect the check not more than ten nor less than three business days prior to such collection; (3) solicitation of a postdated check for the purpose of threatening or instituting criminal prosecution; (4) threatening to deposit any postdated check prior to the date; (5) imposing charges for communications, such as collect telephone calls, by concealment of the true purpose of the communication; (6) taking or threatening to take any nonjudicial action to take away the con-

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<sup>80</sup>Fair Debt Collection Practices Act, Pub. L. No. 95-109, § 807, 95 Stat. 874 (1977). There are other laws proscribing false representation that documents are legal process forms. See FTC Guides Against Debt Collection Deception, 16 C.F.R. § 237.1(7) (1977). See also ch. 88, § 2, 1965 Ind. Acts 124 (formerly codified at IND. CODE § 35-18-13-2 (Burns 1975)) (repealed by Pub. L. No. 26, § 25, 1977 Ind. Acts 160), where the misdemeanor of Deceptive Collection Practice is defined to include "(a) printing for the purpose of sale or distribution, circulating, or offering for sale, or, (b) sending or delivering . . . any notice . . . which . . . simulates a form of court process . . . the intention of which is to lead the recipient . . . to believe the same to be a genuine . . . legal process, for the purpose of obtaining anything of value . . . ."

<sup>81</sup>A consumer reporting agency is defined in the Consumer Credit Protection Act, 15 U.S.C. § 1681(f) (1970), as "[a]ny person which . . . regularly engages . . . in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties . . . ."

<sup>82</sup>Fair Debt Collection Practices Act, Pub. L. No. 95-109, § 808, 91 Stat. 874 (1977).

sumer's property if there is no right or intention to do so; (7) communicating with a consumer by postcard; and (8) using language or symbols on envelopes sent to a debtor which indicate that the envelope is used by a debt collector.<sup>83</sup> A debt collector may use its business name on envelopes if the name does not indicate the nature of the business; otherwise the debt collector may use only a return address on envelopes.<sup>84</sup>

2. *Debt Collector and Third Persons.*—The right of a debt collector to contact third persons in the course of collection work is narrowly circumscribed. A debt collector is authorized by the FDCPA to contact third persons for the purpose of acquiring location information about the consumer. When engaged in that limited activity, the person attempting to collect the debt must identify himself and state that he is confirming or correcting location information concerning the consumer.<sup>85</sup> The person collecting the debt may not identify his own employer unless expressly requested to do so and may not state the consumer owes any debt.<sup>86</sup> In addition, with limited exceptions, the debt collector may not communicate with any third person more than once and, if the debt collector knows the consumer is represented by an attorney, may not communicate with any person other than that attorney.<sup>87</sup> Finally, debt collectors may not communicate by postcard or use any symbols on envelopes that identify the business of collection.<sup>88</sup>

Beyond the right to seek location information, the debt collector may not communicate with any person other than the consumer, the consumer's attorney, consumer reporting agencies, the creditor, the attorney of the creditor, or the attorney of the debt collector.<sup>89</sup> Presumably, the debt collector would not be able to communicate with the consumer's employer or others who may have historically been called upon to influence debtors.<sup>90</sup> There are, however, some limited exceptions to this restriction: Either the consumer or a court of competent jurisdiction may give express permission to the debt collector to communicate with such persons, or communication may be reasonably necessary to effectuate a postjudgment judicial remedy.

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<sup>83</sup>*Id.*

<sup>84</sup>*Id.* § 808(8).

<sup>85</sup>*Id.* § 804(1).

<sup>86</sup>*Id.* § 804(1), (2).

<sup>87</sup>*Id.* § 804(3), (6).

<sup>88</sup>*Id.* § 804(4), (5).

<sup>89</sup>*Id.* § 805(b).

<sup>90</sup>The practice of contacting employers appears to have been approved in some cases by the courts. *See, e.g., Patton v. Jacobs*, 118 Ind. App. 358, 78 N.E.2d 789 (1948).

In connection with legal action by debt collectors, there are some restrictions imposed by the new law. These restrictions are directed to a practice sometimes called "forum abuse," a practice in which collectors file suit in a geographically remote forum and often obtain a default judgment. Under the FDCPA, an action to enforce an interest in real property securing the consumer's debt may only be brought in a judicial district in which the real property is located.<sup>91</sup> Also, in any other action brought within the coverage of the FDCPA by a debt collector, the suit may be brought only in the judicial district in which the consumer signed the contract or in which the consumer resides at the time of commencement of the action.<sup>92</sup>

Finally, the FDCPA prohibits a practice sometimes called "flat rating." A "flat rater" prints and sells to creditors dunning letters bearing the flat rater's letterhead, which appears to be that of a collection agency. The creditors then use these letters to create the impression that a third-party collection agency is collecting the debt. The FDCPA provides that it is unlawful to "furnish any form knowing that such form would be used to create the false belief . . . that a person other than the creditor . . . is participating in the collection."<sup>93</sup> Thus, the person furnishing the forms, even though not a debt collector, would be in violation of the FDCPA. The creditor, by virtue of using a name other than his own, would be a debt collector and subject to the general prohibition on deceptive conduct.<sup>94</sup>

3. *Remedies.*—The remedies available for violation of the new law can be divided into two parts: federal agency enforcement methods and private civil remedies. The Federal Trade Commission is given enforcement responsibilities,<sup>95</sup> assuming jurisdiction under a provision of the FDCPA, which states that a violation of the FDCPA shall be deemed to be an unfair deceptive act or practice in violation of the Federal Trade Commission Act.<sup>96</sup> If, however, some other federal agency has specific jurisdiction over the type of entity involved in debt collection, that agency will be charged with enforcement responsibility.<sup>97</sup> For example, compliance with respect to national banks will be enforced under the Federal Deposit Insurance Act by the Comptroller of the Currency.<sup>98</sup> However, because this is

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<sup>91</sup>Fair Debt Collection Practices Act, Pub. L. No. 95-109, § 811(a)(1), 91 Stat. 874 (1977).

<sup>92</sup>*Id.* § 811(a)(2).

<sup>93</sup>*Id.* § 812(a).

<sup>94</sup>*Id.* § 812(b).

<sup>95</sup>*Id.* § 814(a).

<sup>96</sup>*Id.* § 814(b).

<sup>97</sup>*Id.* § 814.

<sup>98</sup>*Id.* § 814(b)(1)(A).

considered comprehensive legislation, which completely addresses collection abuse problems, the agencies charged with enforcement are not authorized to issue additional regulations.<sup>99</sup>

The private remedy afforded by the FDCPA<sup>100</sup> is similar to the private remedy for violation of other titles of the Consumer Credit Protection Act (CCPA).<sup>101</sup> First, if a debt collector fails to comply with any provision of the new title, the consumer may sue for actual damages and a civil penalty not exceeding \$1,000. Unlike the general private remedy under the CCPA, the civil penalty for violation of the FDCPA is not linked to the amount of the finance charge, nor is there a minimum recovery. In the case of a class action, there is a unique feature provided by the FDCPA: The class representatives will be entitled to recover the amount to which they would have been entitled, including the civil penalty, if the suit had been brought as an individual action.<sup>102</sup> In addition, the court may award the members of the class actual damages plus a civil penalty not to exceed the lesser of \$500,000 or 1% of the net worth of the debt collector.<sup>103</sup> Under the general remedy provision of the CCPA, there is a different formulation in which the representative plaintiffs in a class action are entitled to recover only an equal share of the class recovery along with all other class members. In addition, there is an identical limit on the total amount of class recovery—\$500,000 or 1% of the net worth of the creditor.<sup>104</sup> The result is that in some cases under the general private remedy section of the CCPA an injured consumer might find it a disadvantage to bring a class action since the recovery of a representative plaintiff would, because of the maximum limits on class recovery, be less than an individual recovery. This problem seems to have been solved adroitly in the FDCPA.

Finally, the new FDCPA provides that a successful plaintiff is entitled to recover costs of the action together with a reasonable attorney's fee, as determined by the court.<sup>105</sup> This language is identical to the language of the general private remedy provision of the CCPA.<sup>106</sup> However, in the FDCPA, there is an additional provision

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<sup>99</sup>*Id.* § 814(d).

<sup>100</sup>*Id.* § 813.

<sup>101</sup>15 U.S.C. § 1640(a) (Supp. V 1975).

<sup>102</sup>Fair Debt Collection Practices Act, Pub. L. No. 95-109, § 813(a)(2)(B), 91 Stat. 874 (1977).

<sup>103</sup>*Id.*

<sup>104</sup>15 U.S.C. § 1640(a)(2), (3) (Supp. V 1975) (amended by Pub. L. No. 94-240, § 4, 90 Stat. 260 (1976)).

<sup>105</sup>Fair Debt Collection Practices Act, Pub. L. No. 95-109, § 813(a)(3), 91 Stat. 874 (1977).

<sup>106</sup>15 U.S.C. § 1640 (Supp. V 1975).

which states that if the court makes a finding that the action was brought in bad faith and for the purpose of harrassment, the court may award attorney's fees to the *defendant* in relation to work expended and costs.<sup>107</sup>

### *J. Truth in Lending*

In *Mirabal v. General Motors Acceptance Corp.*,<sup>108</sup> the Court of Appeals for the Seventh Circuit addressed several questions under the Federal Consumer Credit Protection Act (CCPA) and the Federal Reserve Board's Regulation Z. The plaintiff, Mirabal, purchased an automobile from defendant Ed Murphy Buick and financed part of the purchase price through defendant General Motors Acceptance Corp. (GMAC). As part of this transaction, Mirabal received a retail installment sales contract with the disclosures required by the CCPA and Regulation Z. Among these disclosures was an annual percentage rate (APR) of 11.08%, a figure which was inaccurate apparently because the figure was taken from the wrong line of a conversion table or rate chart by the employee who filled out the disclosure form. About one week after this transaction, GMAC sent a letter to Mirabal explaining that the APR was computed improperly and providing the correct APR, which was 12.83%. Apparently no further action was taken by GMAC; the Mirabals filed an action a few months later, charging numerous violations of the CCPA based on the defendants' inaccurate disclosure of the APR.<sup>109</sup> The trial judge found seven specific violations of the CCPA and imposed a civil penalty for each violation; he also allowed recovery under the Illinois consumer protection laws. Thus, the defendants were jointly and severally liable for a cumulative judgment in excess of \$8,000.

Both parties appealed, and in the course of the appeal several significant truth-in-lending questions were addressed. Those questions concerned the scope of the CCPA's bona fide error defense for creditors, and three questions exploring multiple recoveries—the right to recover for multiple errors, the right to recover separately against multiple creditors, and the right of joint borrowers to recover separately.

Defendants' principal contention was that the inaccuracy in the APR resulted from a bona fide error for which they claimed an exemption under section 130(c) of the CCPA. That section provides: "A creditor may not be held liable . . . if the creditor shows by a

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<sup>107</sup>Fair Debt Collection Practices Act, Pub. L. No. 95-109, § 813(a)(3), 91 Stat. 874 (1977).

<sup>108</sup>537 F.2d 871 (7th Cir. 1976).

<sup>109</sup>Ed Murphy Buick "arranged for" the extension of credit and GMAC "extended" credit. *Id.* at 874 n.1. See Regulation Z, 12 C.F.R. § 226.2(f) (1977). As a result, both were creditors within the meaning of the CCPA.

preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error."<sup>110</sup> Although no proof was apparently offered on the specific procedure utilized in this transaction, the defendants did, in general, describe the system GMAC had in operation. That system consisted of training personnel and distributing forms, rate charts, and conversion tables designed to achieve compliance with the CCPA's disclosure requirements. In the course of affirming the trial judge's decision on this point, the court of appeals stated that the immunity provided by section 130(c) was available only if the creditor had instituted some preventive mechanism above and beyond the procedures that were aimed at good faith compliance. The court stated that "it is clear . . . that Congress required more than just a showing that a well-trained and careful clerk made a mistake. On the other hand, a showing that the first well-trained clerk's figuring was checked by a second well-trained clerk or that one clerk made the calculations on an adding machine and then checked this by looking up the figures on a table would satisfy Congress's requirements."<sup>111</sup> Although in this case the procedures were designed to provide correct disclosures, they did not contain any type of preventive mechanism for catching disclosure errors. In addition, even if such a checking procedure had been adopted, the defendant would have had to show that the procedure was consistently *maintained*. Apparently there was a gap in defendants' testimony on this point.<sup>112</sup>

The court's discussion of the bona fide error defense suggests at least two thoughts for creditors. First, in order to preserve this defense, it seems that a creditor must do more than establish a system of well-trained and careful clerks armed with forms and tables to fill out disclosure forms. The creditor will probably be required to have some checking procedure, such as the clerk checking the figure derived from the table with a calculator. Second, the creditor must maintain the procedures uniformly, and the creditor's employees must be able to testify that a certain procedure and certain charts or tables were used in *all* transactions.

The three other questions raised on appeal dealt with multiple recoveries. First, the trial court had awarded a civil penalty under section 130(a) of the CCPA for each of the several violations that were alleged. On appeal the defendant attacked this holding, arguing that only one civil penalty should be imposed even though multiple violations may exist in the disclosure statement. The court of appeals upheld the defendant's contention on the basis of the CCPA's legislative history and the fact that the CCPA was amended in 1974 to specifically reject multiple penalties for violations in a single

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<sup>110</sup>15 U.S.C. § 1640(c) (Supp. V 1975). Most courts have concluded that bona fide error is confined to clerical errors and does not include such things as mistakes of law. See *Ives v. W. T. Grant Co.*, 522 F.2d 749, 757 (2d Cir. 1975).

<sup>111</sup>537 F.2d at 878-79.

<sup>112</sup>*Id.* at 879.

transaction.<sup>118</sup> The court also noted the problems that would be raised by permitting a civil penalty to be imposed for each of a series of disclosure errors. For example, if a disclosure statement were omitted altogether, the court would have no basis for computing the number of disclosure violations. There could be as many as fifty violations and as many as fifty penalties imposed. This result was presumably not the intention of Congress.

Second, the plaintiffs argued that the trial court had erred in holding the defendants jointly liable; they argued that since there were two creditors, each should be held separately liable for the full civil penalty. Some support for this position could be found in the language of the CCPA, which provides: "[A]ny creditor who fails to comply . . . is liable to such person . . ." <sup>114</sup> However, the court of appeals affirmed the trial court's holding. It stated that this language was not dispositive since it "could refer to the fact that Congress intended liability for disclosure violations to reach each and every creditor rather than just the creditor who held the credit contract or the one who made it. And, thus, it need not imply that joint creditors are separately liable . . ." <sup>115</sup> Since only one of the creditors was receiving the benefit of the finance charge and, in effect, only one was providing credit, their conduct should be viewed as joint conduct, and they should be jointly liable under the Act.<sup>116</sup> The court reserved judgment on the situation where two creditors each make separate and independent disclosure errors in one transaction or where each makes separate disclosures and each disclosure contains an independent or different violation.

Finally, the trial judge awarded only one civil penalty for both joint obligors, and the plaintiffs argued that this was in error; they argued that each obligor in the consumer credit contract should be allowed to recover a separate penalty. The court of appeals held that since both obligors incurred debts on the contract, both should be entitled to recover.<sup>117</sup> This conclusion is consistent with the

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<sup>118</sup>The 1974 amendments to the CCPA provided that they would "apply in determining the liability of any person under . . . the Truth in Lending Act, unless prior to the date of enactment of this Act [Oct. 28, 1974] such liability has been determined by final judgment of a court of competent jurisdiction and no further review . . . may be had by appeal or otherwise." Pub. L. No. 93-495, § 408(e), 88 Stat. 1500 (1974). The transaction in the *Mirabal* case took place in July 1971, and the trial court's decision was entered before these amendments were enacted. The court of appeals in *Mirabal* honored the statute's retroactive provision and rejected a constitutional attack by the plaintiffs. 537 F.2d at 875.

<sup>114</sup>15 U.S.C. § 1640(a) (Supp. V 1975).

<sup>115</sup>537 F.2d at 881.

<sup>116</sup>See also *Meyers v. Clearview Dodge Sales, Inc.*, 539 F.2d 511, 520-21 (5th Cir. 1976).

<sup>117</sup>There seems to be some disagreement on this question. Compare *Hinkle v. Rock Springs Nat'l Bank*, 538 F.2d 295, 297 (10th Cir. 1976) with *Clausen v. Beneficial Fin. Co.*, 423 F. Supp. 985 (N.D. Cal. 1976) and *Mirabal v. General Motors Acceptance Corp.*, 537 F.2d 871 (7th Cir. 1976). See text accompanying note 108 *supra* for a discussion of *Mirabal*.

language of the statute, which states: "[A]ny creditor who fails to comply [with this Act] with respect to any person is liable to such person . . . ."<sup>118</sup> Finally, the court noted that its decision would obviate some practical questions that might be generated by a holding that joint obligors could recover only one penalty. For example, if one joint obligor sued and the other joint obligor was not joined as a party, would the suing obligor be entitled to recover the full penalty or only one-half of it? If one joint obligor recovered the entire penalty, could the other joint obligor sue for his one-half?

## VII. Criminal Law and Procedure

*M. Anne Wilcox\**

The decisions handed down during this survey period and discussed in this Article deal exclusively with statutory provisions now superseded by the enactment of a unified code of criminal law and procedure for the State of Indiana, effective on October 1, 1977.<sup>1</sup> The Indiana Supreme Court and Court of Appeals opinions and judicial interpretations under prior law will have continued vitality for the practitioner as prosecutions under these former statutes reach the trial and appellate states and will continue to serve as guidelines for the exploration of issues raised by the new Penal Code. The opinions that are included in this survey were chosen for their significance to the area of criminal law with emphasis upon their applicability to general constitutional and procedural principles. The cases are discussed in the order in which the respective issues involved would arise in the various stages of the criminal process, beginning with pre-trial matters and continuing with issues pertaining to the trial and post-trial stages.

### A. Search and Seizure

1. *Arrest Warrants.*—The protections afforded by the fourth amendment<sup>2</sup> in regard to unreasonable arrests and detentions were extended to a defendant in a paternity proceeding in *J.E.G. v. C.*

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<sup>118</sup>15 U.S.C. § 1640(a) (Supp. V 1975).

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The author wishes to thank Joy R. Tolbert for her assistance in the preparation of this discussion.

<sup>1</sup>See Kerr, *Foreword: Indiana's Bicentennial Criminal Code, 1976 Survey of Recent Developments in Indiana Law*, 10 IND. L. REV. 1 (1976). See also Kerr, *Forward: Indiana's New and Revised Criminal Code, 1977 Survey of Recent Developments in Indiana Law*, 11 IND. L. REV. 1 (1977).

<sup>2</sup>U.S. CONST. amend. IV provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and