

tive damages in all bad faith breach of contract cases.⁶⁶ The development of punitive damage recovery in consumer contract suits⁶⁷ should increase the likelihood of such suits, thereby encouraging increased awareness of consumers' rights.

VII. Contracts and Commercial Law

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During the past year there have been several interesting developments in Indiana involving contract and commercial law. The following discussion is a cursory review of some of the most significant of those developments.

Some matters which might logically be considered here are discussed in the section of this survey on consumer law. This section does not duplicate that discussion. Most significant among these other matters are developments in the subject of remedies for breach of contract. First, the Indiana Court of Appeals continued to approve punitive damage awards in breach of contract actions where the defendant's conduct was oppressive;¹ secondly, the Indiana General Assembly amended a provision of the Sales Article of the Uniform Commercial Code to provide for the recovery of attorneys' fees in fraud actions.²

A. Statute of Frauds

It is not unusual for a person who has been disappointed with the results of some medical procedure to sue the person under whose care the procedure was administered claiming not only negligence, but also breach of contract to produce a specific medical result.³ In cases of this kind, defendants have often ar-

⁶⁶Ashman, *Contracts . . . Punitive Damages, What's New in the Law*, 61 A.B.A.J. 101 (1975).

⁶⁷See Note, *The Expanding Availability of Punitive Damages in Contract Actions*, 8 IND. L. REV. 668, 681-86 (1975).

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¹See pp. 131-32 *supra*.

²See p. 130 & note 58 *supra*.

³See, e.g., Annot., 43 A.L.R.3d 1221 (1972). Agreements of this kind are not merely implied contracts to use reasonable care, but are in the nature of warranties of cure.

gued that it is necessary for members of the medical profession to make positive, encouraging statements about medical procedures to give patients confidence and thus aid the recovery process. It has been argued that these "therapeutic assurances" should not be translated into contract liability and that, therefore, as a matter of policy, the only cause of action between patient and physician should be for the physician's failure to use reasonable care. Despite this argument courts have uniformly permitted juries to resolve the question of whether or not there was such a contract if there was proof of a "specific, clear, and express promise."⁴ In some cases a jury verdict for breach of contract to produce a specific medical result has been upheld even though there has been a finding that the defendant exercised reasonable care.⁵

This potential contract liability has apparently caused some discomfort for members of the medical profession. Not only is there potential interference with "therapeutic assurances," but the statute of limitations period for contract liability may be longer than for tort liability.⁶ In addition, medical malpractice insurance often does not protect against this form of contract liability.⁷ Finally, an agreement to produce a specific medical result may be in violation of the ethical standards of the medical profession.

In 1975 the Indiana General Assembly enacted two laws which

⁴See *Guilmet v. Campbell*, 385 Mich. 57, 70, 188 N.W.2d 601, 607 (1971).

⁵*Guilmet v. Campbell*, 385 Mich. 57, 188 N.W.2d 601 (1971); *Hawkins v. McGee*, 84 N.H. 114, 146 A. 641 (1929). In the *Hawkins* case the court reversed a jury award for the plaintiff on the ground that the instructions on damages were erroneous. However, the court affirmed that a contract recovery was appropriate even though a negligence action had been dismissed without exception.

⁶Unlike most states Indiana has a special statute of limitations provision which limits actions against medical professionals to two years whether the action is in contract or tort. IND. CODE § 34-4-19-1 (Burns 1973). Presumably this statute would limit actions brought on agreements to produce a specific medical result. Arguably, this statute has been in part superceded by *id.* § 16-9.5-3-1 (Burns Supp. 1975). The new statute continues a two year limit on actions in contract or tort and presumably would limit actions on agreements to produce a specific medical result. If not, IND. CODE § 34-1-2-2 (Burns 1973) would limit such actions. It provides a twenty year limitation on "contracts in writing other than those for the payment of money." Of course, only agreements in writing are enforceable.

⁷See, e.g., *McGee v. United States Fidelity & Guar. Co.*, 53 F.2d 953 (1st Cir. 1931). See also *Security Ins. Group v. Wilkinson*, 297 So. 2d 113 (Fla. Ct. App. 1974) (involving a hospital); *Squires v. Hayes*, 13 Mich. App. 449, 164 N.W.2d 565 (1968); *Safian v. Aetna Life Ins. Co.*, 260 App. Div. 765, 24 N.Y.S.2d 92 (1940); *Berman v. Aetna Life Ins. Co.*, 256 App. Div. 916, 10 N.Y.S.2d 860 (1939) (both *Safian* and *Berman* are distinguishable from *McGee* because they involved an insurance policy specifying that the physician should not enter into a contract to cure); *Sutherland v. Fidelity & Cas. Co.*, 103 Wash. 583, 175 P. 187 (1918).

should minimize, and perhaps eliminate, this kind of physician's contract liability. First, an amendment to the general Statute of Frauds⁹ creates a new sixth category in the Statute. As amended, the Statute of Frauds provides that no action may be brought "upon an agreement, promise, contract, or warranty of cure relating to medical care or treatment" unless there is a writing signed by the party to be charged.⁹ Secondly, the General Assembly enacted a comprehensive law dealing with the rights and procedures by which injured patients may sue health care providers.¹⁰ Among other things, this law provides that unless there is a writing signed by the health care provider "[n]o liability shall be imposed . . . on the basis of an alleged breach of contract, express or implied, assuring results to be obtained from any procedure undertaken in the course of health care"¹¹

The reason for the simultaneous enactment of these two laws is not readily apparent since they appear to cover the same general subject matter. There are some subtle differences in the application of the two provisions, but these differences do not suggest any pattern for explaining the possible duplication. For example, the Malpractice Act creates the protection of the writing requirement for "health care providers" in the course of providing "health care."¹² A health care provider is defined as a "person . . . licensed by this state to provide health care or professional services as a physician, hospital, dentist, registered or licensed practical nurse, optometrist, podiatrist, chiropractor, physical therapist, or psychologist"¹³ However, the protection of the Act is only available to those health care providers who are qualified, and a patient's remedy against a "nonqualified" health care provider "will not be affected by the terms and conditions" of the Act.¹⁴ Qualification under the Act requires proof of financial responsibility and payment of a surcharge to the Indiana Patient's Compensation Fund.¹⁵ On the other hand, the new general Statute of Frauds provision applies to agreements "relating to

⁹IND. CODE § 32-2-1-1 (Burns Supp. 1975), *amending id.* § 32-2-1-1 (Burns 1973).

⁹*Id.* § 32-2-1-1 (Burns Supp. 1975).

¹⁰*Id.* §§ 16-9.5-1-1 to -9-10 (Burns Supp. 1975) [hereinafter referred to as the Malpractice Act].

¹¹*Id.* § 16-9.5-1-4.

¹²Section 16-9.5-1-1(i) provides:

"Health care" means any act, or treatment performed or furnished, or which should have been performed or furnished, by any health care provider for, to, or on behalf of a patient during the patient's medical care, treatment or confinement.

¹³*Id.* § 16-9.5-1-1(a).

¹⁴*Id.* § 16-9.5-1-5.

¹⁵*Id.* § 16-9.5-2-1.

medical care or treatment." In this context the expression "health care" used in the Malpractice Act could have a broader meaning than the expression "medical care or treatment" used in the amended Statute of Frauds. Thus, it is possible that a health care provider could be furnishing "health care" and thus be protected by the Malpractice Act and yet may not be furnishing "medical care or treatment" in order to obtain the protection of the new general Statute of Frauds provision. This could become important if any of those health care providers failed to "qualify" under the Malpractice Act. Furthermore, physicians, who are undoubtedly providing "medical care" within the meaning of the new general Statute of Frauds provision, would be protected by that provision even though they had failed to "qualify" under the Malpractice Act. This residual protection for at least some "non-qualified" health care providers appears to be inconsistent with the policy of the Malpractice Act denying protection to those health care providers who are not "qualified."¹⁶

B. *Modification of Contracts*

Perhaps in homage to logical precision, though for somewhat obscure historical reasons, English and American courts have refused to enforce modifications of contracts unless the party deriving benefit from the modification furnished new consideration.¹⁷ The only apparent commercial policy served by this technical restriction is the protection it provides against modifications extorted under a threat of nonperformance.¹⁸ There is little evidence that businessmen ever observe, or even know about, this restriction on their ability to adjust their relationships. Recognizing the shallowness of this doctrine, the drafters of the Uniform Commercial Code provided that "an agreement modifying a contract . . . needs no consideration to be binding."¹⁹ The restriction thus no

¹⁶*Id.* § 16-9.5-1-5. The section provides that "[a] health care provider who fails to qualify under this article . . . is not covered by the provisions of this article and is subject to liability under the law without regard to the provisions of this article."

¹⁷See J. CALAMARI & J. PERILLO, *THE LAW OF CONTRACTS* § 61, at 120-22 (1970).

¹⁸The doctrine and the resultant restriction may have evolved in cases where there was fear that extortion existed. See *Stilk v. Myrick*, 2 Camp. 317, 170 Eng. Rep. 1168 (C.P. 1809). For a case in a commercial context where there appeared to be a form of extortion, although the court emphasized the logical precision of the consideration doctrine, see *Lingenfelder v. Wainwright Brewing Co.*, 103 Mo. 578, 15 S.W. 844 (1891).

¹⁹IND. CODE § 26-1-2-209(1) (Burns 1974) [hereinafter referred to as UCC or Code].

longer applies for all "transactions in goods."²⁰ However, the Official Comments to the UCC make it clear that only modifications made in good faith will be enforced; modifications "without legitimate commercial reason" will be ineffective.²¹ This seems to continue the protection against extorted modifications provided by the blanket unenforceability of the common law while at the same time providing businessmen both flexibility in their activities and operating rules consistent with their practices.

In *Seastrom, Inc. v. Amick Construction Co.*²² and *Myers v. Maris*,²³ the Court of Appeals this past year had an opportunity to reconsider these issues but declined to do so. The court stated in *Seastrom*, without discussion, that "any such modification must be supported by a new and distinct consideration."²⁴ It is not clear why the court did not apply the UCC principle in *Seastrom*. The opinion did not make it clear whether the modified agreement was for a sale of goods, a lease of goods, or a lease of goods with an option to purchase.²⁵ If a sale of goods was involved, it is clear that the court should have applied the UCC; but even if the transaction involved a lease, it could have been a transaction in goods to which the UCC should have been applied.²⁶

C. Broad Hold Harmless Clauses

Broad hold harmless clauses are terms in contracts which obligate one of the parties to indemnify the other party for any liability which results from some common venture, whether the liability results from the fault of the person making the promise of indemnity or the fault of the promisee.²⁷ For example, sub-

²⁰Section 26-1-2-209(1) applies to contracts "within this article." Section 26-1-2-102 provides that "this article applies to transactions in goods."

²¹UNIFORM COMMERCIAL CODE § 2-209, Comment 2.

²²315 N.E.2d 431 (Ind. Ct. App. 1974).

²³326 N.E.2d 577 (Ind. Ct. App. 1975).

²⁴315 N.E.2d at 433.

²⁵*Id.* at 432. It is clear that the asphalt plant, which was the subject of the agreement, constituted "goods." See IND. CODE § 26-1-2-105(1) (Burns 1974).

²⁶Courts have applied the UCC in lease transactions. See, e.g., *Hawkins Constr. Co. v. Matthews Co.*, 190 Neb. 546, 209 N.W.2d 643 (1973); *Hertz Commercial Leasing Corp. v. Transportation Credit Clearing House*, 59 Misc. 2d 226, 298 N.Y.S.2d 392 (N.Y. City Ct. 1969); *Owens v. Patent Scaffolding Co.*, 14 UCC REP. SERV. 610 (N.Y. Sup. Ct., Kings County, March 8, 1974).

²⁷The following is an example of this kind of broad hold harmless clause: The Subcontractor shall indemnify and hold harmless the Contractor and all of his agents and employees from and against all claims, damages, losses and expenses including attorney's fees arising out of or resulting from the performance of the Subcontractor's work whether it is caused in part or in whole by a party indemnified hereunder. In any and all

contractors often make such promises to general contractors in connection with construction projects. If the general contractor negligently injures an employee of the subcontractor, and the injured employee sues the general contractor, the general contractor may invoke the broad hold harmless clause and shift the liability.²⁸ Being thus forced into the role of an insurer can have a pernicious effect on the promisor, especially if the promisor's business insurance does not cover contract liability. Although Indiana courts have avoided the harshness of some hold harmless clauses through narrow construction²⁹ and have declared other hold harmless clauses unconscionable where unequal bargaining power was present,³⁰ they have sustained the premise that these clauses are enforceable.³¹

In an effort to protect construction contractors against the pernicious effects of these clauses, the 1975 Indiana General Assembly enacted a law declaring broad hold harmless clauses to be "against public policy" and "void and unenforceable."³² The new law does not, however, apply to contracts made before July 1, 1975.³³ The new law also does not apply to highway construction

claims against the Contractor, or any of his agents and employees by any employee of the Subcontractor, anyone directly or indirectly employed by him or anyone for whose acts he may be liable, the indemnification obligation under this Paragraph shall not be limited in any way by any limitation on the amount of type of damages, compensation or benefits payable by or for the Subcontractor under workmen's compensation acts, disability benefit acts or other employee benefit acts.

HANDBOOK FOR SUBCONTRACTORS, B 4-5 (1973) (compiled by the Indiana Subcontractors Association, Inc., 4755 Kingsway Drive, Indianapolis, Indiana 46205). There are other less severe forms of hold harmless agreements which do not apply where the promisee is at fault. *See, e.g.*, AIA Document A401, Standard Form of Agreement Between Contractor and Subcontractor, art. 11.20 (The American Institute of Architects, Jan. 1972 ed.).

²⁸This situation was adapted from *Di Lonardo v. Gilbane Bldg. Co.*, 334 A.2d 422 (R.I. 1975).

²⁹*Auto Owners Mut. Ins. Co. v. Northern Ind. Pub. Serv. Co.*, 414 F.2d 192 (7th Cir. 1969); *Norkus v. General Motors Corp.*, 218 F. Supp. 398 (S.D. Ind. 1963); *General Tel. Co. v. Penn Cent. Co.*, 149 Ind. App. 50, 270 N.E.2d 337 (1971); *General Accident & Fire Assurance Corp. v. New Era Corp.*, 138 Ind. App. 349, 213 N.E.2d 329 (1966).

³⁰*Weaver v. American Oil Co.*, 257 Ind. 458, 276 N.E.2d 144 (1971).

³¹*Indemnity Ins. Co. of N. America v. Koontz-Wagner Elec. Co.*, 233 F.2d 380 (7th Cir. 1956). For a recent case in another jurisdiction reaching the same conclusion on this point see *Di Lonardo v. Gilbane Bldg. Co.*, 334 A.2d 422 (R.I. 1975).

³²IND. CODE § 26-2-5-1 (Burns Supp. 1975).

³³The law is not retroactive probably in order to avoid a challenge under the contract clause of the United States Constitution. *See* note 129 *infra*.

contracts³⁴ or construction contracts "if liability insurance normally available within the United States at standard rates cannot be obtained for the facility . . . because it constitutes a dangerous instrumentality."³⁵

D. Warranty

1. Privity—The Uniform Commercial Code

In *Karczewski v. Ford Motor Co.*,³⁶ the United States District Court for the Northern District of Indiana held that there is no privity of contract requirement in a suit brought on a warranty of fitness for a particular purpose under UCC section 2-315.³⁷ The plaintiff was a purchaser of a secondhand Ford automobile which had been driven 16,000 miles by the first owner. Shortly thereafter the plaintiff was injured when the car went out of control because of, as the plaintiff alleged, a defective carburetor spring. The plaintiff sued Ford, the manufacturer, and the case was tried successfully by the plaintiff before a jury on three theories: negligence; the principle found in *Restatement (Second) of Torts*, section 402A;³⁸ and the UCC warranty of fitness for a par-

³⁴It is not apparent why highway construction contracts have been excluded from this law, although they have been excluded from other legislation protecting contractors. See IND. CODE § 5-16-5.5-1(c) (Burns 1974) (highway contractors were specifically excluded from the statute providing for bonds to protect subcontractors).

³⁵*Id.* § 25-2-5-2 (Burns Supp. 1975). This exemption appears to cover contracts made by public utilities where the construction work is undertaken on a facility such as a nuclear reactor.

³⁶382 F. Supp. 1346 (N.D. Ind. 1974).

³⁷In rendering its decision the court relied on *Filler v. Rayex Corp.*, 435 F.2d 336 (7th Cir. 1970). In *Filler* a 16-year-old boy lost his right eye when he was hit with a baseball and his baseball sunglasses shattered. The sunglasses had been advertised by the Rayex Corporation as suitable for wearing while playing baseball. After a bench trial the trial judge entered a judgment against the defendant Rayex for \$101,000. Even though there was no privity between the plaintiff and the defendant, the court relied on breach of the warranty of fitness for a particular purpose as one of its grounds for allowing recovery. The court of appeals affirmed this ruling, emphasizing that, while advertised as suitable for wearing while playing baseball, the sunglasses were not made of plastic or shatterproof glass and thus were not fit for the particular purpose for which they were sold.

³⁸RESTATEMENT (SECOND) OF TORTS § 402A (1965) provides as follows:
Special Liability of Seller of Product for Physical Harm to User or Consumer

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product,

ticular purpose.³⁹ Ford objected to the third theory on the ground that there was no privity of contract between it and the plaintiff. The court found that Ford was a “seller” and that the plaintiff was a “buyer” within the meaning of those words in UCC section 2-315⁴⁰ and that this “seller” had warranted that the automobile was fit for the particular purpose of ordinary driving on streets. A breach of the warranty occurred when the automobile proved to be unfit for ordinary driving by going out of control.

This part of the holding of the *Karczewski* case, viewed in its broadest sense, may present some problems in terms of the scope of the principle established. For example, it may not be completely clear whether the decision removes the privity barrier altogether for suits under section 2-315 or whether it approves only a suit against a remote seller whose conduct has actually given rise to the buyer’s reliance and the warranty. If the court intended the former, there would seem to be an unreasonable burden placed on sellers of goods, since they would have to stand responsible for the disappointed expectations of subsequent buyers even if, as remote sellers, they had nothing to do with creating particular expectations and even though they gave no assurance that their products would be fit for the purposes for which they were ultimately used. As a result, the principle of not requiring privity probably should be confined to those cases where remote sellers have reason to know that their advertising will cause remote buyers to presume the product’s fitness for the purpose described in the advertising. Indeed, the court in *Karczewski* began its recitation of the facts by describing the plaintiff’s testimony on Ford’s advertising.⁴¹ This suggests that the court intended the limitation on its holding discussed above.

and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

³⁹IND. CODE § 26-1-2-315 (Burns 1974) provides:

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller’s skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

⁴⁰382 F. Supp. at 1352.

⁴¹The court recited the fact that the defendant had advertised on television, radio, and in newspapers. *Id.* at 1348.

Perhaps more important, however, is the question of whether the principle of *Karczewski* should be applied to those cases where the plaintiff has suffered economic loss⁴² unaccompanied by personal injury or property damage. Courts have disagreed over whether the privity barrier should be removed in cases where the plaintiff suffered only economic loss,⁴³ but have agreed that cases involving only economic loss present questions of policy which may be different from those involved in personal injury or property damage cases.⁴⁴ A logical extension of *Karczewski* would permit recovery against remote sellers for economic loss since the UCC remedies sections provide for recovery for economic loss as well as personal injury or property damage losses.⁴⁵ This extension should probably not be made, however, without coming to grips with the possibly variant questions of policy involved in economic loss cases. As a result, the holding of *Karczewski* on the question of privity should probably be limited to cases where the

⁴²The expression "economic loss" has been coined to describe those losses which are not associated with personal injury or property damage. It includes the lost value which results from the buyer not having a product of the quality required by his agreement and lost profits caused by the buyer not having full use of a conforming product. See J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 11-5 (1972) [hereinafter cited as WHITE & SUMMERS]; Note, *Economic Loss in Product Liability Jurisprudence*, 66 COLUM. L. REV. 917 (1966).

⁴³Courts have permitted recovery against a remote seller on the tort theory of strict liability where only economic loss was involved. See *Cova v. Harley Davidson Motor Co.*, 26 Mich. App. 602, 182 N.W.2d 800 (1970); *Santor v. A & M Karagheusian, Inc.*, 44 N.J. 52, 207 A.2d 305 (1965). Some courts have permitted recovery on a UCC warranty theory. See *Mack Trucks, Inc. v. Jet Asphalt & Rock Co.*, 246 Ark. 101, 437 S.W.2d 459, 6 UCC REP. SERV. 96 (1969); *Manheim v. Ford Motor Co.*, 201 So. 2d 440 (Fla. 1967); *Continental Copper & Steel Indus. Inc. v. E. C. "Red" Cornelius, Inc.*, 104 So. 2d 40 (Fla. Ct. App. 1958); *Lang v. General Motors Corp.*, 136 N.W.2d 805 (N.D. 1965). Most courts, however, have denied recovery where there is only economic loss. See, e.g., *Poldon Eng'r & Mfg. Co. v. Zell Elec. Mfg. Co.*, 1 Misc. 2d 1016, 156 N.Y.S.2d 169 (N.Y. City Ct. 1965); *State ex rel. Seed Prod. Corp. v. Campbell*, 250 Ore. 262, 442 P.2d 215 (1968); *Henry v. John W. Eschelman & Sons*, 99 R.I. 518, 209 A.2d 46, 2 UCC REP. SERV. 154 (1965); *Kyker v. General Motors Corp.*, 214 Tenn. 521, 381 S.W.2d 884 (1964); *Oliver Corp. v. Green*, 54 Tenn. App. 647, 393 S.W.2d 625 (1965). See also WHITE & SUMMERS § 11-5.

⁴⁴See, e.g., *Seely v. White Motor Co.*, 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965).

⁴⁵According to IND. CODE § 26-1-2-714 (Burns 1974), the measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted and, also, in a proper case, any incidental and consequential damages.

plaintiff has suffered personal injury or property damage.⁴⁶ Thus limited, the application of UCC section 2-315 in *Karczewski* appears strikingly similar to the principle found in section 402A of the *Restatement (Second) of Torts*, although some differences might come into play in connection with disclaimers,⁴⁷ notice of defects,⁴⁸ and the statute of limitations.⁴⁹

2. Privity—Sale of Homes

The Indiana courts this year also dealt with the problem of privity of contract in the context of a sale of a residential dwelling. Four years ago, in the celebrated case of *Theis v. Heuer*,⁵⁰ the Indiana Supreme Court adopted the principle that a builder-vendor of a residential dwelling made an implied warranty to a vendee of fitness for habitation. The vendee thus could sue the vendor for breach if the residential dwelling was not habitable. This year, in *Barnes v. MacBrown & Co.*,⁵¹ the First District Court

⁴⁶In fact the court may have signaled this limitation when it emphasized that there was no privity requirement "under the circumstances of the present suit." 382 F. Supp. at 1352 (emphasis added).

⁴⁷In strict liability cases disclaimers should have little or no effect. *Arrow Transp. Corp. v. Fruehauf Corp.*, 289 F. Supp. (D. Ore. 1968); *Vandermark v. Ford Motor Co.*, 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964); *Cornette v. Searjeant Metal Prods., Inc.*, 147 Ind. App. 46, 258 N.E.2d 652 (1970); *Mendel v. Pittsburgh Plate Glass Co.*, 25 N.Y.2d 340, 305 N.Y.S.2d 490, 253 N.E.2d 207 (1969). See RESTATEMENT (SECOND) OF TORTS § 402A, Comment M (1965). On the other hand, disclaimers may be very significant in actions on UCC warranties. See IND. CODE § 26-1-2-316 (Burns 1974). It should be noted that section 108 of the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C.A. § 2308 (Supp. 1, 1975), will make all disclaimers of implied warranties ineffective with respect to goods manufactured after July 4, 1975, where any written warranty is made to a consumer or where a supplier enters into a service contract with a consumer with respect to the goods.

⁴⁸See IND. CODE § 26-1-2-607(2) (Burns 1974) which provides that in order to preserve a claim for breach of warranty the buyer must give reasonable notice. There is no such requirement in suits brought on the principle found in section 402A of the *Restatement (Second) of Torts*.

⁴⁹In Indiana the statute of limitation in strict liability cases is 2 years. IND. CODE § 34-1-2-2 (Burns 1973). Under the UCC the statute of limitations period is 4 years after the breach occurs, which is usually at the time of tender of delivery. *Id.* § 26-1-2-725(1) (Burns 1974).

⁵⁰280 N.E.2d 300 (Ind. 1972), adopting opinion of 149 Ind. App. 52, 270 N.E.2d 764 (1971), discussed in *Lockyear, Torts, 1973 Survey of Indiana Law*, 7 IND. L. REV. 262, 268 (1973), & *Contracts and Commercial Law*, *id.* at 56-57. See also *Gable v. Silver*, 258 So. 2d 11 (Fla. Ct. App.), *aff'd*, 264 So. 2d 418 (Fla. 1972); *Davis v. Vintage Enterprises Inc.*, 23 N.C. App. 581, 209 S.E.2d 824, 15 UCC REP. SERV. 1066 (1974) (the court found an implied warranty of habitability for a mobile home).

⁵¹323 N.E.2d 671 (Ind. Ct. App. 1975).

of Appeals declined an opportunity to extend the principle of the *Theis* case to protect subsequent purchasers of a home. The builder, MacBrown, sold the house to Shipman in 1968. Shipman, in turn, sold the house to Barnes in 1971. After taking up residence in the house, Barnes discovered a large crack around three of the basement walls. The crack caused leaking, requiring \$3,500 in repair expenditures. Barnes sued MacBrown for breach of implied warranty. The court of appeals held that the trial court's dismissal of the complaint was appropriate because no privity of contract existed between Barnes and MacBrown.⁵² *Barnes* apparently involved only economic loss. Therefore, it is similar to the decisions in defective product cases, discussed above, which have imposed a privity requirement where the plaintiff suffered only economic loss.⁵³

3. Disclaimers

In recent years many courts have adopted the view that warranty disclaimers contained in warranty booklets delivered to the buyer along with, for example, an auto⁵⁴ or airplane,⁵⁵ do not bind the buyer because these disclaimers are simply not part of the bargain in fact between the parties. In *Karczewski*, discussed earlier, the defendant included disclaimers in such a "Warranty Facts" booklet, and this booklet apparently was in the auto at the time Karczewski took possession of it.⁵⁶ The court followed the apparent trend in ruling that these disclaimers did not as a matter of law prevent recovery on an implied warranty since, among

⁵²*Id.* at 672.

⁵³Although the *Barnes* court was not requested to deal with the question, it should be noted that there probably would be no warranty of habitability made by the immediate seller in this case. It would probably be inappropriate to require a private individual selling a used residential dwelling to make such a warranty. This is consistent with warranty principles applicable in sale of goods cases, where the warranty of merchantability is made only by persons who are merchants with respect to the kind of goods being sold. IND. CODE § 26-1-2-314 (Burns 1974). A merchant is a person "who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary . . ." *Id.* § 26-1-2-104.

⁵⁴*See, e.g.,* Chrysler Corp. v. Wilson Plumbing Co., 132 Ga. App. 435, 208 S.E.2d 321 (1974); Zoss v. Royal Chevrolet, Inc., 11 UCC REP. SERV. 527 (Monroe County, Indiana, Super. Ct., Nov. 15, 1972), noted in *Contracts and Commercial Law, 1973 Survey of Indiana Law*, 7 IND. L. REV. 55, 61-62 (1973).

⁵⁵*See, e.g.,* Omni Flying Club, Inc. v. Cessna Aircraft Co., 315 N.E.2d 885 (Mass. 1974).

⁵⁶382 F. Supp. at 1349.

other things, the plaintiff "was never contractually bound by the contents of said book in any explicit sense."⁵⁷

4. Contributory Negligence

This year, in *Gregory v. White Truck & Equipment Co.*,⁵⁸ the Indiana Court of Appeals addressed, apparently for the first time, the issue of whether or not contributory negligence is a defense to an action on an implied warranty of fitness for a particular purpose.⁵⁹ The plaintiff, Gregory, purchased a new REO diesel tractor at retail from White. The tractor was to be fitted by White with a semitrailer hitch commonly known as a fifth wheel assembly. This fifth wheel assembly was attached through a process that involved welding ear tabs to the tractor frame. While Gregory was towing a cargo-laden trailer, the ear tabs broke off and, according to Gregory's proof, the trailer detached from the tractor causing the heavy trailer to force the tractor off the road and damage both the tractor and cargo. Gregory sued White, alleging, among other things, that White had breached the implied warranty of fitness for a particular purpose. The case was tried before a jury on this theory only, and White offered proof that Gregory was speeding at the time of the accident. White claimed that this speeding constituted negligence and contributed to the loss of control. The trial court's instructions to the jury were replete with the statement that if Gregory had been contributorily negligent, he could not recover for breach of warranty. After a verdict for the defendant, Gregory appealed.

In reversing the trial court on the basis of the contributory negligence instructions, the Second District Court of Appeals analyzed the defenses which are available in actions based on the principle found in section 402A of the *Restatement (Second) of Torts* or, as the court suggested, the "new warranty."⁶⁰ The court

⁵⁷*Id.* at 1352.

⁵⁸323 N.E.2d 280 (Ind. Ct. App. 1975).

⁵⁹Because the case arose before the UCC was adopted, the court was applying the Uniform Sales Act, ch. 192, § 15, [1929] Ind. Acts 628 (repealed 1963), which created a warranty of fitness for a particular purpose. 323 N.E.2d at 286. This warranty provision has been superseded by IND. CODE § 26-1-2-315 (Burns 1974). This section provides for a warranty of fitness for a particular purpose very similar to the one found in the Uniform Sales Act. Presumably, the discussion of the court with respect to contributory negligence should be applicable to cases arising under the UCC warranty of fitness for a particular purpose. It may also be applicable to cases which arise under the UCC warranty of merchantability, *id.* § 26-1-2-314, and, perhaps, cases which arise under the UCC express warranties, *id.* § 26-1-2-313.

⁶⁰323 N.E.2d at 285. For the wording of section 402A see note 38 *supra*.

found a consistent pattern in the cases of "generalized disapproval of contributory negligence, in its broad sense, as a defense"⁶¹ However, if the plaintiff's conduct was the sole cause of the injury, or if it constituted an incurred risk,⁶² or if it amounted to a misuse of the product, it would serve to defeat the plaintiff's claim.⁶³ In this context incurred risk apparently refers to voluntarily and unreasonably proceeding to encounter a known danger, and misuse of the product apparently refers to abnormal use of the product not contemplated by the defendant. The court reasoned that these standards should also be applied in suits brought on implied commercial warranties or, as the court referred to them, the "traditional warranties."⁶⁴ Therefore the trial court's instructions were improper because they permitted the jury to consider contributory negligence, of any kind, as an absolute defense.⁶⁵

On remand in this case, the trial court may have three further problems. First of all, it may be difficult to define misuse of the product. For example, if the product is the fifth wheel assembly, the fact that Gregory was driving too fast for conditions may not have been a misuse of the product. Secondly, if, as is more likely, the product is the tractor and driving too fast would constitute a misuse of it, a question arises as to whether any misuse will bar recovery or whether recovery will be barred only by unforeseeable misuse. It seems reasonable to conclude that some forms of misuse or abnormal use are foreseeable and, therefore, should not bar recovery. Most courts have concluded that the question of whether a particular form of misuse is foreseeable should be left to the jury.⁶⁶ Finally, the decision in *Gregory* seems to make contributory negligence entirely irrelevant unless it constitutes misuse or incurred risk. If, therefore, the jury decided that there was a breach of warranty and no misuse, or only a foreseeable misuse, the fact that Gregory was driving too fast for conditions would not affect the verdict. This seems unnecessarily harsh since it would mean that White would be responsible in full for injuries which may have been exaggerated by Gregory's

⁶¹323 N.E.2d at 286.

⁶²In Indiana, courts have been careful to note a distinction between assumed risk and incurred risk. Assumed risk apparently is something which must come through an explicit agreement between the parties; incurred risk is the act of proceeding to encounter known dangers. See *Rouch v. Bisig*, 147 Ind. App. 142, 258 N.E.2d 883 (1970).

⁶³323 N.E.2d at 287.

⁶⁴*Id.* at 285.

⁶⁵*Id.* at 290.

⁶⁶See W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 668-69 (4th ed. 1971); Dale & Hilton, *Use of the Product—When Is It Abnormal?* 4 WILLAMETTE L.J. 350 (1967).

conduct. It might, under these circumstances, be more equitable to permit the jury to consider the plaintiff's conduct in mitigation of damages even though this may require speculative judgments on apportionment of loss.⁶⁷

E. Due Process of Law and Commercial Transactions

During the past six years, the United States Supreme Court has invalidated three different state commercial collection laws on the grounds that they deprived debtors of due process of law. The Court in these cases invalidated certain state prejudgment garnishment,⁶⁸ replevin,⁶⁹ and attachment statutes.⁷⁰ Stimulated in part at least by these decisions, due process challenges to various commercial laws and practices have been litigated in the lower courts with somewhat mixed results.⁷¹ This year the Court of Appeals for the Seventh Circuit dealt with due process challenges to commercial practices in two cases: *Phillips v. Money*⁷² and *T.A. Moynahan Properties, Inc. v. Lancaster Village Cooperative, Inc.*⁷³ *Phillips* involved a possessory artisan's lien created by In-

⁶⁷*Cf. Hinderer v. Ryan*, 7 Wash. App. 434, 499 P.2d 252, 11 UCC REP. SERV. 306 (1972). It should be noted that this is not a case where the court would have to adopt a comparative negligence standard. The seller's liability is based on warranty, not negligence.

⁶⁸*Sniadach v. Family Fin. Corp.*, 392 U.S. 337 (1969).

⁶⁹*Fuentes v. Shevin*, 407 U.S. 67 (1972). The Supreme Court appeared to recant the position taken in *Fuentes* in *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974). Some clarification was furnished in *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975).

⁷⁰*North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975).

⁷¹The variety of devices which have been challenged is extensive. For example, due process challenges have been made to mechanics' liens. *Ruocco v. Brinker*, 380 F. Supp. 432 (S.D. Fla. 1974); *Spielman-Fond, Inc. v. Hanson's, Inc.*, 379 F. Supp. 997 (D. Ariz. 1973); *Cook v. Carlson*, 364 F. Supp. 24 (S.D.S.D. 1973); *Roundhouse Constr. Corp. v. Telesco Masons Supplies Co.*, (Conn. 1975), in 38 Conn. Law Journal No. 43, April 22, 1975, at 1 (invalidating the Connecticut mechanics' lien law). Challenges also have been made to the warehousemen's lien created by UCC sections 7-209 and 7-210. *Melara v. Kennedy*, 15 UCC REP. SERV. 12 (N.D. Cal. 1974) (upholding the validity of those sections); *Jones v. Banner Moving & Storage, Inc.*, 78 Misc. 2d, 358 N.Y.S.2d 885, 15 UCC REP. SERV. 1 (Sup. Ct. 1974) (holding those sections unconstitutional). Due process challenges have been made to self-help repossession under UCC sections 9-503 and 9-504. The following cases found these sections valid: *Shirley v. State Nat'l Bank*, 493 F.2d 739 (2d Cir. 1974); *Adams v. Southern Cal. First Nat'l Bank*, 492 F.2d 324 (9th Cir. 1973), *cert. denied*, 419 U.S. 1006 (1974); *Bichel Optical Laboratories, Inc. v. Marquette Nat'l Bank*, 487 F.2d 906 (8th Cir. 1973). The following cases found these sections invalid: *Boland v. Essex County Bank & Trust Co.*, 361 F. Supp. 917 (D. Mass. 1973); *Gibbs v. Titelman*, 369 F. Supp. 38 (E.D. Pa. 1973).

⁷²503 F.2d 990 (7th Cir. 1974), *cert. denied*, 420 U.S. 934 (1975).

⁷³496 F.2d 1114 (7th Cir. 1974).

diana state law; *Moynahan* involved termination of a contract by a United States government agency.

In *Phillips* the plaintiff was the owner of an automobile which had been detained by the defendant, a mechanic, who claimed a lien under Indiana common and statutory law for services which he had rendered on the vehicle. The plaintiff filed an action for damages and recovery of the vehicle under 42 U.S.C. § 1983.⁷⁴ He claimed that the laws permitting this lien caused a delegation of "an essentially public or governmental function to the mechanic" and that the state had "inextricably entwined itself in the creditor's private activity"⁷⁵ According to the plaintiff this constituted state action. Because there was no requirement under the law for notice and hearing before giving effect to the mechanic's lien, the plaintiff claimed that the procedure deprived him of his property without due process of law.

The United States District Court for the Southern District of Indiana dismissed the action and the Seventh Circuit affirmed on two grounds. First, the court held that the "state merely establishes the legal context in which individuals conduct their private affairs"⁷⁶ and, therefore, the state action necessary to invoke fourteenth amendment protection was lacking. Secondly, the court held that possessory lien rights are inherently different from the collection devices that the Supreme Court found constitutionally objectionable. In those cases where the device was found objectionable, the creditor had only a property interest in the goods, while in this case the creditor had not only a property interest—a lien right—but also physical possession of the goods. The court stated that the interests of both antagonistic parties in the goods in question must be weighed in determining whether or not a procedure comports with due process requirements. In this case the creditor's lien right coupled with his possession of the goods constituted a sufficient interest so that there was nothing fundamentally unfair about his exercise of the artisan's lien. The court's reasoning seems consistent with other decisions upholding self-help creditors' remedies against procedural due process attack.⁷⁷ The court was careful to note, however, that its decision does not resolve whether self-help repossession under the UCC is consis-

⁷⁴42 U.S.C. § 1983 (1970).

⁷⁵503 F.2d at 993.

⁷⁶*Id.* at 994 (footnote omitted).

⁷⁷*Nolan v. Professional Auto Sales, Inc.*, 496 F.2d 16 (8th Cir. 1974); *Bichel Optical Laboratories, Inc. v. Marquette Nat'l Bank*, 487 F.2d 906 (8th Cir. 1973); *Nichols v. Tower Grove Bank*, 362 F. Supp. 374 (E.D. Mo. 1973); *Pease v. Havelock Nat'l Bank*, 351 F. Supp. 118 (D. Neb. 1972); *Annot.*, 18 A.L.R. FED. 223 (1974).

tent with the fourteenth amendment due process requirement.⁷⁸

Moynahan confronted the Seventh Circuit with a procedural due process challenge to the manner in which the Department of Housing and Urban Development (HUD) terminated a management contract. The plaintiff, Moynahan, was a management agent for Lancaster, the owner of multi-family low income housing financed through FHA. In the management contract between Lancaster and Moynahan, to which HUD endorsed its consent,⁷⁹ was a provision which permitted HUD to cancel the agreement, with or without cause, on 30 days' written notice. Moynahan and Lancaster were involved in a series of disputes during the term of the contract which resulted in a request by Lancaster to have HUD terminate Moynahan's contract. HUD responded to this request by sending a formal letter to Moynahan on April 26, 1972, notifying him that the agreement was terminated as of May 31, 1972. There was no explanation in this letter as to why Moynahan was being terminated.

Moynahan sued Lancaster and HUD alleging a deprivation of due process of law under the fifth amendment. The District Court for the Southern District of Indiana held that the termination by HUD was a nullity and enjoined HUD from terminating the contract without affording an appropriate procedure to protect Moynahan's rights. The Seventh Circuit affirmed the district court on the issue of the right, in general, to a due process hearing procedure. After finding that Moynahan had a property right in the contract with which HUD could not deal arbitrarily, the court stated that "the minimum requirements are a written statement of the reasons for the proposed action and an opportunity to present material . . . challenging the accuracy of supposed facts relied on and the rationality of the reasons stated."⁸⁰ However, the court found that in this case the discussions between Moynahan and HUD and the hearing in the district court had given Moynahan an opportunity to make known any facts or arguments on his behalf. Therefore, the court considered "the deficiencies in the notice of cancellation to have been adequately cured."⁸¹ Thus, since the termination in this particular case did not constitute a violation of Moynahan's due process rights, the trial court's decision nullifying the termination was reversed. This decision could

⁷⁸503 F.2d at 994 n.7.

⁷⁹Apparently when the FHA originally endorsed its consent to the contract, it received the cancellation power. HUD was the successor to this right. 496 F.2d at 1115.

⁸⁰*Id.* at 1118.

⁸¹*Id.*

affect the manner in which the government exercises rights under a variety of clauses found in procurement contracts.⁸²

F. Conversion of Checks

The Second District Court of Appeals this year was presented with an interesting problem involving conversion of checks. In *Yeager & Sullivan, Inc. v. Farmers Bank*,⁸³ the court found that Yeager & Sullivan, Inc. (Yeager) and Robert and William McCarty (McCarty) were engaged in a joint venture by which Yeager sold feeder pigs on credit to McCarty, retained a security interest in those feeder pigs while they were being developed, and, upon ultimate sale of the feeder pigs by McCarty, obtained payment from the proceeds. Because some problems arose with respect to these transactions which made Yeager insecure about McCarty's performance, Yeager notified all markets where McCarty was selling feeder pigs that any checks issued to McCarty in payment for feeder pigs should be made payable to McCarty and Yeager. In December and January 1968, five such checks were made payable by different buyers of feeder pigs to McCarty and Yeager in payment for feeder pigs. McCarty deposited these five checks for collection at the Farmers Bank without obtaining Yeager's indorsement.⁸⁴ In some cases Yeager's signature apparently was forged by McCarty and in other cases the checks were simply indorsed by only one of the two payees.⁸⁵ The Farmers Bank forwarded all these checks for collection, and they were paid by the

⁸²The Court of Appeals for the Seventh Circuit has since distinguished the holding in *Moynahan*. In *Harlib v. Lynn*, 511 F.2d 51 (7th Cir. 1975), the court refused to require notice and a hearing before HUD authorized the owner to increase rent for subsidized housing. The court said that the rent increase did not "totally abrogate" the lessees' property rights as did the termination of the contract in *Moynahan*. *Id.* at 55 n.11.

⁸³317 N.E.2d 792 (Ind. Ct. App. 1974).

⁸⁴In this case the checks which were of concern on appeal were made payable to Yeager and McCarty but the conjunctive word "and" was not used. IND. CODE § 26-1-3-116 (Burns 1974) provides that unless the instrument is made payable in the alternative (the use of the word "or"), the instrument is payable to all parties named as payees and may be negotiated only by all of them. The parties to the appeal in this case did not deny that the indorsement of both payees was required for proper negotiation. 317 N.E.2d at 794.

⁸⁵In either case there was a conversion since the instruments could not be negotiated or collected without the indorsements of both of the named payees. This would not, however, have been the case if Yeager had been a customer of the Farmers Bank. In that case IND. CODE § 26-1-4-205 (Burns 1974) would have permitted Farmers Bank to supply any indorsement of the customer which was necessary to title. The court did not address the question of why a joint venturer did not have the authority to sign the other joint venturer's name and thus negotiate the checks.

various payor banks. After discovering the unauthorized negotiation of these five checks, Yeager sued Farmers Bank for conversion.⁶⁶

The first obstacle confronting Yeager in this conversion action was UCC section 3-419(3), which provides that "a depository . . . bank, who has in good faith and in accordance with the reasonable commercial standards applicable to the business . . . dealt with an instrument . . . on behalf of one who was not the true owner is not liable in conversion" This section apparently was drafted to immunize depository and collecting banks from conversion liability while they are acting merely as agents for collection with respect to items deposited by their customers. Notwithstanding the apparent breadth and certainty of this section, courts uniformly have refused to apply it to relieve depository or collecting banks from liability.⁶⁷ In *Yeager* the trial court, following this pattern, found that the bank had not dealt with the instruments "in accordance with the reasonable commercial standards applicable to the business" ⁶⁸ and thus was not entitled to immunity.⁶⁹ This conclusion was not challenged on appeal.

⁶⁶Yeager also sued McCarty, but McCarty's motion for judgment on the evidence was sustained because a prior judgment barred the action. 317 N.E.2d at 794. Yeager clearly would have had a cause of action against the payor banks in this case under IND. CODE § 26-1-3-419 (Burns 1974), but these payor banks may have been located in different jurisdictions and suits against them could have presented an unnecessarily complicated method of seeking recovery.

⁶⁷*See, e.g.,* Cooper v. Union Bank, 9 Cal. 3d 371, 507 P.2d 609, 107 Cal. Rptr. 1 (1973); Harry H. White Lumber Co. v. Crocker-Citizens Nat'l Bank, 253 Cal. App. 2d 368, 61 Cal. Rptr. 381, 4 UCC REP. SERV. 617 (1967); Ervin v. Dauphin Deposit Trust Co., 84 Dauph. Co. Rep. 280, 38 Pa. D. & C.2d 473, 3 UCC REP. SERV. 311 (C.P. 1965); WHITE & SUMMERS at 504 (where the authors state that what has happened to this section "shouldn't happen to a dog"). There is sound policy for curtailing the effect of UCC section 3-419(3). In cases involving unauthorized payees' signatures, the payee clearly can sue a payor bank for conversion; it is equally clear that a payor bank can sue collecting and depository banks for breach of a presentment warranty. *See* IND. CODE § 26-1-4-207 (Burns 1974). This places the responsibility for these losses, in a rather circuitous fashion, on the depository bank. Rather than force the payee along this circuitous route, which may involve suits in different jurisdictions, it is probably better to permit a direct action against the depository bank.

⁶⁸317 N.E.2d at 794, quoting from IND. CODE § 26-1-3-419(3) (Burns 1974).

⁶⁹Other courts have also concluded that a depository bank did not act in accordance with reasonable commercial standards and thus could not use the immunity afforded by UCC section 3-419(3). *See, e.g.,* Salsman v. National Community Bank, 102 N.J. Super. 482, 246 A.2d 162, 5 UCC REP. SERV. 799 (1968). In *Yeager*, the court could have based its finding of lack of

A more significant problem, however, was whether or not the defendant could assert in mitigation of its liability the fact that the funds which had been produced by the conversion had been applied in part for the benefit of the plaintiff. Farmers Bank offered proof that three of the five converted checks had been deposited in an account which was owned by McCarty and used for the exclusive purpose of furthering the joint venture feeder pig business. Funds drawn from this account, therefore, were spent for the direct benefit of Yeager since they were spent to discharge debts for which Yeager, as a joint venturer, would be responsible. The trial court, adopting this reasoning, found that Farmers Bank was only responsible as a converter for the amount of the two checks which had not been deposited in this account.

In reversing on this issue, the court of appeals held that the simple fact that the funds were applied for the benefit of Yeager was not sufficient to relieve the bank of its conversion liability because to do so would allow "the tortfeasor to dictate to the true owner how his property is to be used."⁹⁰ The court stated that in order to establish that its liability should be mitigated, the defendant would have to show that the converted funds were applied not only for the benefit of the plaintiff but as well to the specific debt or contractual purpose for which the funds were intended. In this case the court of appeals, on its own motion, found such a purpose. The court noted that two of the checks which were drawn on the account into which the three converted checks were deposited had been made payable to subfeeders who had a statutory lien on joint venture feeder pigs in their possession—a lien which was superior to Yeager's security interest.⁹¹ Since Yeager's interest in the pigs was subordinate to these lienholders, and since Yeager could not realize anything from the venture until these liens were discharged, the funds paid to these subfeeders were paid on "a specific debt to which the proceeds of sale were to apply."⁹² In addition, the court volunteered that "mitigation may be shown by a discharge of a lien the converted property was subject to."⁹³ Therefore, Farmers Bank could use the amount of these two checks in mitigation of their conversion liability.⁹⁴

reasonable commercial standards on the fact that the depository bank accepted some of these checks without the essential signature of one of the payees.

⁹⁰317 N.E.2d at 799.

⁹¹*Id.* at 800. IND. CODE § 32-8-29-1 (Burns 1973) provides that persons engaged in feeding hogs and other livestock shall have a lien upon such property for feed and care. *Id.* § 26-1-9-310 (Burns 1974) gives that lien priority over consensual security interests.

⁹²317 N.E.2d at 800.

⁹³*Id.*

⁹⁴The total face value of the five checks was \$6,528.73. The face value of

G. Franchising

1. Sales of Franchises

In recent years several states have enacted laws directed at abuses in the sale of franchises.⁹⁵ In its 1975 session the Indiana General Assembly joined this movement by enacting a comprehensive law dealing with franchise sale abuses.⁹⁶ The new law defines franchises as contracts by which a franchisee pays a franchise fee and in return is granted the right to do business under a marketing scheme prescribed by and identified with the franchisor or his trademark.⁹⁷ This includes contracts "whereby the franchisee is granted the right to sell franchises on behalf of the franchisor."⁹⁸ Although perhaps literally falling within this broad definition, certain agreements, such as those between credit card issuers and retailers, between trading stamp companies and retailers, or between manufacturers and distributors, are not considered franchises under the new law because there is, in those agreements, no "franchise fee;" there is only a fee for services rendered or a bona fide wholesale price of goods.⁹⁹

The law applies to any offer to sell a franchise or to any franchise relationship if the offeree or franchisee is an Indiana resident or if the franchised business will be operated in Indiana.¹⁰⁰ There are, however, two important exceptions to the coverage of the law. First, a franchise sale is exempt from the law's registration and supervision provisions if it is conducted by a large franchisor¹⁰¹ who makes certain disclosures to prospective

the three checks deposited in the McCarty account at Farmers Bank used in the feeder pig business was \$5,409.20. The trial court had awarded a judgment to the plaintiff for the two checks not deposited in the McCarty account. These two checks had a face value of \$1,119.53. The amount which was withdrawn from the McCarty account and used to pay the lienholders was \$1,900.00. This was the amount which the court of appeals held that the defendant depository bank was entitled to in mitigation. Therefore, on remand the trial court should increase the judgment amount to a total of \$4,628.73.

⁹⁵See, e.g., CAL. CORP. CODE §§ 31000-516 (West Supp. 1975); ILL. ANN. STAT. ch. 121½, §§ 701-40 (Smith-Hurd Cum. Supp. 1975); MICH. COMP. LAWS ANN. §§ 445.1501-45 (Supp. 1975-1976). In addition, the Federal Trade Commission has proposed a rule on disclosures in franchise sales. See 36 Fed. Reg. 21,607 (1971), revised at 39 Fed. Reg. 30,360 (1974).

⁹⁶IND. CODE §§ 23-2-2.5-1 to -50 (Burns Supp. 1975).

⁹⁷*Id.* §§ 23-2-2.5-1(a) (1), -(2).

⁹⁸*Id.* § 23-2-2.5-1(a) (3).

⁹⁹*Id.* § 23-2-2.5-1(i).

¹⁰⁰*Id.* § 23-2-2.5-2.

¹⁰¹*Id.* § 23-2-2.5-3. Many of the states which have enacted this kind of franchise legislation have this exemption or one similar to it. See, e.g., CAL. CORP. CODE § 31101 (West Supp. 1975). The Indiana exemption is based on two criteria involving the size and activity of the franchisor. First, the

franchisees. This exemption from registration and supervision by the securities commissioner is apparently designed to exclude those large franchisors who have sufficient assets and stability to pay claims made by franchisees. Also, these large franchisors and their franchise programs may be so well known that there is little potential for misrepresentation of the terms of the franchises. Finally, large franchisors can take advantage of the exemption only if they comply with the extensive disclosure requirement.¹⁰² The second exception is for franchise sales which are made by franchisees who are not affiliates of the franchisor and who make the sales for their own account. These sales are also exempt from the registration and supervision provisions.¹⁰³

The law creates two major mechanisms designed to protect against abuses in franchise sales. First, the franchisor must register the franchise with the securities commissioner before he makes any offer or sale of a nonexempt franchise.¹⁰⁴ The application for registration must include an elaborate series of disclosures about the nature of the franchise and the franchisor's business, and the information contained in this application must be made available to prospective franchisees.¹⁰⁵ Thereafter, based on these registration documents, the securities commissioner may take a series of steps designed to protect prospective franchisees. These steps include the following: Impounding franchise fees if the commissioner finds that the applicant has failed to demonstrate that adequate financial arrangements have been made to fulfill obligations to provide such things as real estate improvements or equipment;¹⁰⁶ issuing stop orders denying the effectiveness of or suspending or revoking a registration under certain circumstances;¹⁰⁷

franchisor must have a net worth of not less than \$5 million. IND. CODE § 23-2-2.5-3(a) (Burns Supp. 1975). Secondly, the franchisor must have had at least 25 franchisees conducting business at all times during the 5-year period immediately preceding the time in which exemption is claimed, or must have conducted the business which is the subject of the franchise continuously for not less than 5 years preceding that date. *Id.* § 23-2-2.5-3(b). These exemptions have been criticized. See Note, *Franchise Regulation: An Appraisal of Recent State Legislation*, 13 B.C. IND. & COM. L. REV. 529, 546 (1971).

¹⁰²The franchisor must make the disclosures in writing and must furnish them to the franchisee at a time relevant to the franchisee's decision to enter into the franchise relationship. IND. CODE § 23-2-2.5-3(c) (Burns Supp. 1975) lists the specific disclosures that must be made.

¹⁰³*Id.* § 23-2-2.5-4.

¹⁰⁴*Id.* § 23-2-2.5-9.

¹⁰⁵*Id.* § 23-2-2.5-10 (listing the information which the application for registration must contain).

¹⁰⁶*Id.* § 23-2-2.5-12.

¹⁰⁷*Id.* § 23-2-2.5-14.

filing civil actions for injunctive or other relief;¹⁰⁸ conducting investigations with respect to possible violations of the law;¹⁰⁹ reviewing all advertising concerning franchises subject to registration and prohibiting advertising which the commissioner finds to be inconsistent with disclosure requirements;¹¹⁰ and, finally, referring matters to the prosecuting attorney of a county in which a violation of the law, for which criminal sanctions are provided, may have occurred.¹¹¹ To facilitate the investigation of possible violations, every franchisor is required to maintain a complete set of books, records, and accounts of sales subject to the law.¹¹² To facilitate private litigation and civil actions brought by the securities commissioner, every registrant must give an irrevocable consent appointing the secretary of state as his attorney to receive service of process in any civil action.¹¹³

The second major protective mechanism in the law is the private civil remedy provided in section 23-2-2.5-27.¹¹⁴ This section is a general antifraud provision, apparently drafted to parallel rule 10b-5 adopted under the Securities Exchange Act of 1934.¹¹⁵ In the past aggrieved franchisees have experienced some difficulties in proving a cause of action for traditional fraud, breach of contract, or violation of securities laws. This section should give some aid to these franchisees since it provides a new general vehicle for claims for abuses in franchise sales. If a party recovers judgment for a violation of this section, or of any other section of this law, he may recover consequential damages,¹¹⁶ interest at 8 percent on any judgment, and reasonable attorney's fees, unless the plaintiff knew the facts concerning the violation or the defendant acted prudently and innocently.¹¹⁷ The law also provides that

¹⁰⁸*Id.* § 23-2-2.5-32.

¹⁰⁹*Id.* § 23-2-2.5-33.

¹¹⁰*Id.* §§ 23-2-2.5-25, -26.

¹¹¹*Id.* § 23-2-2.5-36.

¹¹²*Id.* § 23-2-2.5-21.

¹¹³*Id.* § 23-2-2.5-24.

¹¹⁴Section 23-2-2.5-27 provides:

It is unlawful . . . in connection with the offer, sale or purchase of any franchise, . . . directly or indirectly: (1) to employ any device, scheme or artifice to defraud; (2) to make any untrue statements of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading; or (3) to engage in any act which operates or would operate as a fraud or deceit upon any persons.

¹¹⁵15 U.S.C. §§ 78a-hh-1 (1970). Rule 10b-5, 17 C.F.R. § 240.10b-5 (1975), was promulgated by the Securities and Exchange Commission under section 10(b) of the Act. 15 U.S.C. § 78b (1970).

¹¹⁶IND. CODE § 23-2-2.5-28 (Burns Supp. 1975). The section apparently is designed to make it clear that a successful plaintiff is not limited to a rescission and restitution measure of recovery.

persons who materially aid or abet in a violation of the law are liable jointly and severally to the same extent as the person who is aided or abetted.¹¹⁸ However, there is no liability if "the person who aided and abetted had no knowledge of or reasonable grounds to believe in the existence of the facts by reason of which the liability is alleged to exist."¹¹⁹

2. Franchisor's Liability for Debts of Franchisee

Typically, in a franchise relationship, the franchisor makes efforts to introduce controls over the franchisee's operation of the franchise business. This is based, at least in part, on the requirements of the Lanham Act,¹²⁰ which encourage certain controls over the licensee of a trademark. At the same time the franchisor usually makes efforts to avoid liability for the operations of the franchisee's business. This is usually made explicit in the agreement between franchisor and franchisee. Franchisor's ambivalence on the subject of control and responsibility can cause difficult problems when a franchisee defaults in his obligations to creditors and the creditors seek recourse against the franchisor.¹²¹

A variation of this problem arose this year in the Indiana courts. In *Sheraton Corporation of America v. Kingsford Packing Co.*,¹²² the franchisor was Sheraton Corporation of America (Sheraton) and the franchisee was Fort Wayne Investment Company (Investment). Franchisor and franchisee entered into an elaborate agreement by which Sheraton gave Investment the right to do business as the Sheraton Fort Wayne Motor Hotel along with the benefit of the marketing plan used by Sheraton for motor hotels. In addition, Sheraton became the management agent for the hotel operation and served as the agent for Investment in making all contracts in the regular course of business. Many of these contracts were with a meat supplier, Kingsford Packing Company (Kingsford). In the course of their dealings over a 3-year period, Investment, and its agent Sheraton, never disclosed that the contracts were being made on behalf of Investment, not Sheraton. On the contrary, Porter, who identified himself as an employee of Sheraton, inspected Kingsford's plant, told Kingsford that Sheraton meat cutting policies had to be observed, and said

¹¹⁷*Id.*

¹¹⁸*Id.* § 23-2-2.5-29.

¹¹⁹*Id.*

¹²⁰15 U.S.C. § 1055 (1970).

¹²¹*Cf.* *Holland v. Nelson*, 5 Cal. App. 3d 308, 85 Cal. Rptr. 117 (1970); *Nichols v. Arthur Murray, Inc.*, 248 Cal. App. 2d 610, 56 Cal. Rptr. 728 (1970).

¹²²319 N.E.2d 852 (Ind. Ct. App. 1974).

that because he was an employee of Sheraton, he could get meat from it in Chicago at a price lower than Kingsford's. Kingsford did not send bills for each delivery but sent monthly billings addressed to Sheraton for meat delivered. This limited credit was extended on the basis of Kingsford's previous dealings with Sheraton. Payments on account were made by check bearing the name Sheraton Fort Wayne Motor Hotel and, in most cases, Sheraton's trademark.

In 1971 Investment filed a voluntary petition in bankruptcy and Kingsford was given notice as a creditor. This was the first time that Kingsford knew that it was not dealing with Sheraton. Shortly thereafter Kingsford filed suit against Sheraton for accounts due. After a bench trial the court entered a judgment for Kingsford and Sheraton appealed. The Third District Court of Appeals affirmed on the ground that Sheraton could not deny its responsibility as a party to the contract. This conclusion was predicated on the venerable principle known as estoppel in pais.¹²³ The elements of this estoppel principle are as follows: (1) A false representation or concealment of material facts made with actual or constructive knowledge of the true facts; (2) intent that some other person would rely on the false representation; (3) reliance by the other person on the representation; and (4) lack of knowledge or reasonable means of obtaining knowledge of the true facts on the part of the other person.¹²⁴ In *Kingsford*, Sheraton had "knowingly permitted its trade name to be used . . . without qualification or indication of separate ownership, actively assisted that separate entity to appear identical to Sheraton in terms of physical facilities, management, services, and policies, and actively participated in the operation and management of such separate business entity."¹²⁵ This was a sufficient representation for estoppel to arise. The necessary intent was established by the fact that the natural and probable result of Sheraton's conduct would be reliance by other persons on Sheraton's apparent contractual commitment. Testimony on the subject by Kingsford employees was sufficient to show that there was reliance on the representation.

A final question was whether Kingsford had means of obtaining knowledge of the true facts. Sheraton proved that Investment

¹²³Estoppel in pais is a doctrine that prevents a party from alleging or denying a particular fact in consequence of his conduct. It literally "closes the mouth" of the party against whom it is invoked. See W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 105, at 691-92. (4th ed. 1971). For a classic case see *Griswold v. Haven*, 25 N.Y. 595 (1862).

¹²⁴319 N.E.2d at 856.

¹²⁵*Id.* at 857.

filed a "Certificate of Use of Assumed Name" in the office of the appropriate county recorder showing that Investment was operating as Sheraton Fort Wayne Motor Hotel. However, the court pointed out that Investment was a corporation and that every corporation using an assumed name must also file a copy of its assumed name certificate with the secretary of state.¹²⁶ The court took judicial notice of the fact that no such certificate had been filed with the secretary of state and concluded that this failure to comply strictly with the statutory requirement prevented Kingsford from being "charged with constructive notice of the Investment Company's use of an assumed name."¹²⁷ Since all of the elements of estoppel in pais were present, the court affirmed the trial court's judgment in favor of the plaintiff.

3. Franchise Termination

Franchise or distributorship agreements often include a right of termination which can be exercised by either party for some stipulated cause or, in some cases, without cause. Traditionally these provisions have been enforceable without regard for the motive of the party seeking termination.¹²⁸ However, along with rapid expansion of the use of the franchise form of organizing and financing business, there has developed an increasing sympathy for the franchisee or dealer whose rights are terminated. This sympathy has translated into an erosion of the tradition of enforcing termination provisions without regard for motive. Many states have enacted laws designed to protect various kinds of dealers or franchisees from prejudicial termination or non-renewal¹²⁹ and Congress enacted the Automobile Dealers Day in Court Act.¹³⁰ Courts have begun to place restrictions on the arbi-

¹²⁶*Id.* at 857-58, citing IND. CODE § 23-15-1-1 (Burns 1972).

¹²⁷319 N.E.2d at 858.

¹²⁸*See, e.g.,* *Bushwick-Decatur Motors, Inc. v. Ford Motor Co.*, 116 F.2d 675 (2d Cir. 1940); *Byrd v. Crazy Water Co.*, 140 S.W.2d 334 (Tex. Civ. App. 1940).

¹²⁹*See, e.g.,* IND. CODE § 7-2-1-23(a)(2) (Burns 1972). There are apparently 22 states with some kind of legislation which limits a franchisor's power to terminate. *See* 15 G. GLICKMAN, *BUSINESS ORGANIZATIONS: FRANCHISING* § 3.03[3], 3-17 to -50 (1974). Some state legislation has met with constitutional problems on the issue of retroactivity. *See, e.g.,* *Globe Liquor Co. v. Four Roses Distillers Co.*, 281 A.2d 19 (Del.), *cert. denied*, 404 U.S. 873 (1971). Also, state legislation has met with problems of federal preemption. *See* *Mariniello v. Shell Oil Co.*, 368 F. Supp. 1401 (D.N.J. 1974).

¹³⁰15 U.S.C. §§ 1221-25 (1970). In addition, bills have been introduced in Congress which would affect the termination powers of franchisors. *See, e.g.,* H.R. 16,510, 93d Cong., 2d Sess. (1974); S. 2399, 92d Cong., 1st Sess. (1971); S. 3884, 91st Cong., 2d Sess. (1970); H.R. 13,628, 91st Cong., 1st Sess. (1969).

trary use of these termination powers¹³¹ and, of course, there has also been commentary in the journals.¹³²

In *Montgomery Ward & Co. v. Tackett*,¹³³ the First District Court of Appeals joined in this trend by imposing an obligation of good faith on the franchisor in dealings with his franchisees and affirming a jury verdict for a wrongful franchise termination. The franchisee, Tackett, operated a franchise catalogue store under a Montgomery Ward catalogue marketing plan. The franchise agreement between Ward and Tackett provided that Ward could terminate the franchise relationship in the event Tackett failed to follow Ward's "Current Policies and Procedures." Among Ward's policies was a plan whereby franchisees would pay at the end of each week for all merchandise ordered. If merchandise was not received, the franchisee was to file a form, known as an ICA, claiming credit for the merchandise not received. In the event the merchandise was received after an ICA was sent, the franchisee was to send another form known as an RNC.

Tackett apparently was not receiving due credit from Ward on ICA's and was not being given other promised services. To offset this, Tackett apparently filed improper ICA's and improperly withheld RNC's and payment for some merchandise. Although the relationship between Tackett and Ward was "fraught with difficulty and misunderstanding from its inception,"¹³⁴ Ward apparently made no effort to bring about an accommodation. Instead, Ward terminated the franchise on the ground that Tackett had failed to pay for merchandise and had created fictitious records, all in violation of Ward's "Current Policies and Procedures."

Seven months after the termination of the franchise, Ward brought an action against Tackett for the unpaid price of merchandise delivered, and Tackett counterclaimed alleging bad faith termination of his franchise. The trial court entered judgment on a jury verdict for Tackett on this counterclaim. The court of appeals affirmed this judgment stating that there was sufficient evidence to support a finding that Ward "failed to exercise good faith in its course of dealing with the Tacketts."¹³⁵ The court also

¹³¹See, e.g., *Shell Oil Co. v. Marinello*, 120 N.J. Super. 357, 294 A.2d 253 (1972), *aff'd*, 63 N.J. 402, 307 A.2d 598 (1973), *cert. denied*, 415 U.S. 920 (1974).

¹³²See Gilhorn, *Limitations on Contract Termination Rights—Franchise Cancellations*, 1967 DUKE L.J. 465; Hewitt, *Good Faith or Unconscionability—Franchise Remedies for Termination*, 29 BUS. LAW. 227 (1973); Hewitt, *Termination of Dealer Franchises and the Code—Mixing Classified and Coordinated Uncertainty with Conflict*, 22 BUS. LAW. 1075 (1967).

¹³³323 N.E.2d 242 (Ind. Ct. App. 1975).

¹³⁴*Id.* at 245.

¹³⁵*Id.* at 246.

suggested that the fiduciary principles which govern the relationship between principal and agent apply, in appropriate cases, to the franchise relationship and that those fiduciary principles expose the principal or franchisor to liability for bad faith termination of the relationship even though the agreement provides for the absolute power to terminate.¹³⁶

H. Quasi Contract

1. Mistake of Law

Traditionally, the question of whether a person could recover money paid out under some mistaken assumption, other than in compromising a doubtful claim, often depended on whether the mistaken assumption was one of fact or law.¹³⁷ Courts permitted recovery if the mistaken assumption was one of fact¹³⁸ but refused recovery if the mistaken assumption was one of law.¹³⁹ This dichotomy seems to find its origin in an opinion of Lord Ellenborough written in 1802¹⁴⁰ in which he announced that "every man must be taken to be cognizant of the law,"¹⁴¹ thus implying that there should be no sympathy for a person who acted in ignorance of the law. Although Lord Ellenborough's apparent rationale and this dichotomy repeatedly have been criticized,¹⁴² and several exceptions engrafted on them,¹⁴³ the premise that there can be no recovery where there is only a mistake of law has gained wide acceptance, for a variety of reasons.¹⁴⁴ This year the First District

¹³⁶*Id.* See also Brown, *Franchising—A Fiduciary Relationship*, 49 TEXAS L. REV. 650 (1971).

¹³⁷See RESTATEMENT OF RESTITUTION § 15-55 (1937).

¹³⁸*Id.* § 15.

¹³⁹*Id.* § 45.

¹⁴⁰*Bilbie v. Lumley*, 2 East 469, 102 Eng. Rep. 448 (1802).

¹⁴¹*Id.* at 472, 102 Eng. Rep. at 449.

¹⁴²See 3 A. CORBIN, CORBIN ON CONTRACTS § 617 (1960); J. DAWSON & G. PALMER, CASES ON RESTITUTION 868-73 (1969); RESTATEMENT OF RESTITUTION § 43, at 179 (1937).

¹⁴³Money paid out on a mistake of law by governmental agencies has been recovered apparently for the reason that this protects public funds. See *Neidt v. United States*, 56 F.2d 559 (5th Cir. 1932). Payments made by mistake of law to court officers have been recovered apparently because of the imposition of higher standard of conduct for court officials. See *Goldman v. Staten Island Nat'l Bank & Trust Co.*, 92 F.2d 496 (2d Cir. 1938); *Holderman v. Moore State Bank*, 383 Ill. 534, 50 N.E.2d 741 (1943). Payments made on mistake of foreign law apparently can be recovered. RESTATEMENT OF RESTITUTION § 46(c) & Comment c (1937). Finally, an exception seems to exist where a mistake based on a judgment is later reversed. See *Northwestern Fuel Co. v. Brock*, 139 U.S. 216 (1890).

¹⁴⁴Professor Corbin suggests that courts use mistake of law as an explanation for reaching a result based on one of the following reasons:

Court of Appeals affirmed this principle, holding that persons who had paid fines to the city of Evansville under an invalid ordinance could not recover the fines since the fines were paid voluntarily on the mistaken assumption that the ordinance was valid.¹⁴⁵

2. Recovery for "Necessaries" Furnished to Minors

It is axiomatic that the contracts of an unemancipated minor are avoidable by him,¹⁴⁶ although a minor may be responsible in quasi contract for the fair value of necessaries furnished him. This year, in dicta, the Indiana Supreme Court commented on the liability of both the minor and his parents for certain kinds of necessaries.¹⁴⁷ If parents are providing a home for an unemancipated minor, then apparently a third person may not recover from the child for furnishing room and board to the minor, since under those circumstances the room and board would not be necessary. Similarly, the person furnishing benefits such as room and board cannot recover against the parent since to do so would force the parent to pay for support away from the home when it was being offered at home. With respect to medical care, however, the court took a slightly different view. Where medical services are involved, there is an obligation on both the unemancipated child and his parents to pay the reasonable value of those services, whether or not there is proof that the parent failed to furnish them. The parental liability suggested by this case seems somewhat broader than that set forth in the *Restatement of the Law of Restitution*. The *Restatement* provides that the person furnishing the services can only recover against the parent if the services supplied are immediately necessary to prevent serious bodily harm

(1) [T]he mistake may not have been material or followed by much harm; (2) the money may have been due in equity and good conscience, though not in law; (3) the interests of some innocent third party must be protected; (4) the mistake may have been wholly unilateral and the other party can not be restored to his former position; (5) the payment may have been made in settlement of the disputed claim, with consciousness that the legal right was doubtful; (6) there may have been negligence in making the mistake and delay in seeking relief, with subsequent change of position; (7) the evidence to prove the mistake may not have been clear and convincing; (8) the plaintiff may have sought the wrong remedy, such as rescission when he could have gotten reformation

CORBIN, *supra* note 142, at 756-58 (footnotes omitted).

¹⁴⁵City of Evansville v. Richard Walker, 318 N.E.2d 388 (Ind. Ct. App. 1974).

¹⁴⁶IND. CODE § 29-1-18-41 (Burns 1972).

¹⁴⁷Scott County School Dist. 1 v. Asher, 324 N.E.2d 496 (Ind. 1975).

or suffering or if the parent is failing to supply the necessary services to a minor.¹⁴⁸

VIII. Criminal Law and Procedure

*William A. Kerr**

Three years have now elapsed since the Indiana Court of Appeals acquired jurisdiction to hear criminal appeals and began issuing opinions in criminal cases. The court of appeals filed approximately the same number of opinions during each of the first two years (approximately 195 in the first year and 190 in the second year) but increased this number by a substantial margin during the third year by filing approximately 265 opinions from June 1, 1974, to May 31, 1975. During the same three year period, the Indiana Supreme Court filed approximately 140 opinions during the first year, 100 opinions during the second year, and 101 opinions from June 1, 1974, to May 31, 1975. Criminal cases thus continue to constitute a major portion of the workload handled by both the supreme court and the court of appeals, and the number of such cases makes it essential for this survey to be somewhat selective in nature. The opinions that are included in this survey are discussed in the general order in which the respective issues involved would arise in the various stages of the criminal process, beginning with pretrial issues and continuing with issues pertaining to the trial and post-trial stages. One opinion of the Indiana Supreme Court is considered first, however, because of its significance for criminal law and procedure in general.

During the 1973 session of the Indiana General Assembly, a portion of the proposed Indiana Code of Criminal Procedure prepared by the Indiana Criminal Law Study Commission was enacted into law.¹ Thereafter, the Indiana Supreme Court concluded that these new rules of procedure were in effect and would continue in effect unless the court decided to promulgate rules designed to supersede the ones enacted by the General Assembly or unless any particular provision enacted by the legislature conflicted with a

¹⁴⁸RESTATEMENT OF RESTITUTION §§ 113, 114 (1937).

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¹See Kerr, *Criminal Law and Procedure, 1974 Survey of Indiana Law*, 8 IND. L. REV. 137 n.1 (1974) [hereinafter cited as *1974 Survey of Indiana Law*].