

V. Contracts, Commercial Law, and Consumer Law

Gerald L. Bepko*

A. Introduction

The following discussion reviews some of the most important developments during the past year in contracts, commercial, and related consumer law. Some of the developments which raise contract, commercial, or related consumer law problems may also raise questions concerning secured transactions or creditors' rights and may be discussed in the portion of the Survey devoted to those subjects.¹ No effort will be made to duplicate the analysis of statutes and cases considered in that part of the Survey.

B. Commercial Law

1. *Buyer's Monetary Recovery on Seller's Default.*—There has been some dispute in the past as to the appropriate measure of recovery when the buyer acquires substitute goods after the seller's default.² It has been argued that the buyer's measure of recovery should be limited to that provided under Uniform Commercial Code (U.C.C.) section 2-712,³ dealing with cover: the difference between the price of the substituted goods (cover price) and the contract price.⁴ It could be argued, however, that the right to recover the difference between the cover price and the contract price is a special right which a buyer may utilize only if he has taken the steps provided in U.C.C. section 2-712. On this reasoning, the buyer might be able to purchase a substitute but still rely on the potentially larger measure of recovery provided in section 2-713—the difference between the market price and the contract price.

*Acting Associate Dean and Professor of Law, Indiana University School of Law—Indianapolis. B.S., Northern Illinois University, 1962; J.D., IIT/Chicago-Kent College of Law, 1965; LL.M., Yale University, 1972.

¹Townsend, *Secured Transactions and Creditors' Rights, 1979 Survey of Recent Developments in Indiana Law*, 13 IND. L. REV. 369 (1980).

²See J. WHITE & R. SUMMERS, *HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE* § 6-4, at 190-91 (1972).

³All sections hereafter cited to the U.C.C. are also found in IND. CODE title 26 (1976 & Supp. 1979).

⁴Professors White and Summers make this argument based upon one of the Official Comments to U.C.C. § 2-713. J. WHITE & R. SUMMERS, *supra* note 2, § 6-4, at 191. The comment states: "The present section [dealing with buyer's damages for non-delivery or repudiation] provides a remedy which is completely alternative to cover under the preceding section and applies only when and to the extent that the buyer has not covered." U.C.C. § 2-713, Official Comment 5.

In *Parker v. Rod Johnson Farm Service, Inc.*,⁵ the court of appeals may have provided some guidance on this question. In that case, Parker agreed to provide 5,000 bushels of soybeans to Rod Johnson Farm Service at a price of \$5.09 per bushel. In turn, Farm Service arranged to sell the soybeans at a price of \$5.26 per bushel. In the period when performance was required, Parker delivered only 498 bushels. As a result, Farm Service was forced to purchase other soybeans for more than \$5.09 per bushel in order to satisfy its contracts. Farm Service sued Parker and the trial court awarded damages, apparently without stating the specific method of computation. The court of appeals affirmed this judgment, noting that the *market price* for soybeans was high enough on the relevant dates to justify the award.⁶ The court also stated that the buyer "was entitled to the difference between the market price for soybeans *at the time it learned of the breach* and the contract price."⁷ This language suggests that the court approved the use of a measure of recovery under U.C.C. section 2-713 even though the buyer had purchased substitute goods.

It should be noted that this case may not have been a good vehicle for resolving the dispute over whether a buyer can choose between U.C.C. sections 2-712 and 2-713. The market price and cover price may have been identical in this case because it appeared that the buyer was purchasing soybeans in an established market with published price quotations. If that were the case, it would make less difference whether section 2-712 or 2-713 was the basis for recovery and the court's dicta using the language of section 2-713 would be of less significance. However, even in a market with published price quotations, sections 2-712 and 2-713 could produce different results. Section 2-712(1) requires that cover be made in good faith *without unreasonable delay*. In contrast, section 2-713(1) fixes the measure of damages at the market price *when the buyer learned of the breach*. Under the former provision, the time during which cover can be made may include dates other than the one on which the buyer learns of the breach. Thus, in a market in which prices are changing, these two formulae may produce different results.

⁵384 N.E.2d 1129 (Ind. Ct. App. 1979).

⁶*Id.* at 1132.

⁷*Id.* (emphasis added). A small body of literature is devoted to interpreting the italicized language, which has caused the courts considerable difficulty in the context of an anticipatory breach. See R. NORDSTROM, HANDBOOK OF THE LAW OF SALES § 149, at 454-57 (1970); J. WHITE & R. SUMMERS, *supra* note 2, § 6-7, at 197-202. For examples of cases construing the phrase, see *First National Bank of Chicago v. Jefferson Mortgage Co.*, 576 F.2d 479 (3d Cir. 1978) ("learned of the breach" equals "learned of the repudiation"); *Cargill, Inc. v. Stafford*, 553 F.2d 1222 (10th Cir. 1977) ("learned of the breach" equals "time for performance" if a good reason exists for not covering).

2. *Privity Requirement.*—The concept known as privity has played a significant role in the evolution of the buyer's right to recover for defects in goods purchased.⁸ Some courts have permitted the buyer to recover from his immediate seller, but not from remote sellers in the system by which the goods were distributed.⁹ This distinction has been explained on the ground that there is no privity between the buyer and a manufacturer or middleman; privity exists only between the buyer and the person from whom the buyer purchased.¹⁰

In recent years, courts have relaxed the privity bar by permitting buyers to recover against remote sellers for certain types of loss. If the defective goods caused personal injury or property damage, there will probably be no privity barrier and the buyer will be able to sue remote sellers.¹¹ If, however, the buyer's loss can be explained only in economic terms not associated with personal injury or property damage (loss of the bargain), some courts permit recovery only against those with whom the buyer had a contract, that is, those with whom he was in privity.¹² This distinction seems to be built on the assumption that there is an important difference between personal injury and property damage losses, on the one hand, and purely economic losses on the other. The courts apparently presume that the manufacturer can anticipate personal injury or property damage and thus should be held responsible for those losses. The situation is different, however, when the only injury to the buyer is one based on expectations created in the specific transaction in which the goods are acquired. A manufacturer may not be aware of or capable of anticipating specific expectations created in a remote sale of its goods; hence, the manufacturer should not be held liable for losses associated with disappointment of those expectations.

⁸See W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 96, at 641-43 (4th ed. 1971).

⁹*Id.*

¹⁰*Id.*

¹¹See J. WHITE & R. SUMMERS, *supra* note 2, §§ 11-3 to -4.

¹²See *S.M. Wilson & Co. v. Smith Int'l, Inc.*, 587 F.2d 1363 (9th Cir. 1978); *Fredonia Broadcasting Corp. v. RCA Corp.*, 481 F.2d 781 (5th Cir. 1973); *Southwest Forest Indus., Inc. v. Westinghouse Elec. Corp.*, 422 F.2d 1013 (9th Cir.), *cert. denied*, 400 U.S. 902 (1970); *Mead Corp. v. Allendale Mut. Ins. Co.*, 465 F. Supp. 355 (N.D. Ohio 1979) (under Ohio law, economic losses could be recovered on a theory of strict liability in tort, but not on a theory of negligence); *Arizona v. Cook Paint & Varnish Co.*, 391 F. Supp. 962 (D. Ariz. 1975), *aff'd*, 541 F.2d 226 (9th Cir. 1976), *cert. denied*, 430 U.S. 915 (1977); *Iowa Elec. Light & Power Co. v. Allis-Chalmers Mfg. Co.*, 360 F. Supp. 25 (S.D. Iowa 1973); *Noel Transfer & Package Delivery Serv., Inc. v. General Motors Corp.*, 341 F. Supp. 968 (D. Minn. 1972); *Seely v. White Motor Co.*, 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965) (Traynor, C.J.); *Price v. Gatlin*, 241 Or. 315, 405 P.2d 502 (1965); *Eli Lilly & Co. v. Casey*, 472 S.W.2d 598 (Tex. Ct. App. 1971). See J. WHITE & R. SUMMERS, *supra* note 2, § 11-5.

In *Richards v. Goerg Boat & Motors, Inc.*,¹³ the Indiana Court of Appeals embraced this distinction and concluded that there is a privity requirement if the buyer's only injury is economic.¹⁴ In that case, the plaintiff had purchased a houseboat which developed serious leaks in the hull. The buyer sued not only the dealer from whom the boat had been purchased, but also the manufacturer of the boat. In concluding that privity was necessary, the court stated that "when the cause of action arises out of economic loss related to the loss of the bargain or profits and consequential damages related thereto, the bargained for expectations of buyer and seller are relevant and privity between them is still required."¹⁵ The court added, however, that the reason for the privity requirement would be obviated if the remote seller had actually participated in the transaction.¹⁶ In that case, the remote party would be aware of the expectations created in the sale transaction and could be held to stand responsible for those reasonable expectations. Participation could consist of discussing the product with the consumer, providing a demonstration or inspection ride for the consumer, dealing directly with the consumer concerning problems and corrective measures, or making express warranties to the consumer. In *Richards*, the court found participation on the part of the manufacturer and held that lack of privity was no barrier to recovery.¹⁷

3. *Warranty Disclaimers.*—In *Richards*, the defendants attempted to avoid implied warranty liability on the basis that the sale was "as is."¹⁸ Under U.C.C. section 2-316(3)(a),¹⁹ a sale "as is" excludes warranties of merchantability and fitness for a particular purpose. As proof of the fact that the sale was "as is," the defendants offered a written "description or proposition" which was one of the documents exchanged in the course of negotiating for the boat. The document contained the following language: "The boat has a one year warranty on the hull and the warranty on the engine is still good. It has hand operated marine heads and we will sell as is."²⁰ Presumably on the basis of this language in the document, the trial court decided that the sale was "as is" and granted summary judgment for the defendants.²¹ The court of appeals reversed on this issue for two reasons. First, U.C.C. section 2-316(2)²² requires that

¹³384 N.E.2d 1084 (Ind. Ct. App. 1979).

¹⁴*Id.* at 1092.

¹⁵*Id.* (citation omitted).

¹⁶384 N.E.2d at 1092.

¹⁷*Id.*

¹⁸*Id.* at 1093.

¹⁹See IND. CODE § 26-1-2-316(3)(a) (1976).

²⁰384 N.E.2d at 1094.

²¹*Id.* at 1090.

²²IND. CODE § 26-1-2-316(2) (1976).

language of disclaimer in a writing be conspicuous in order to exclude warranties.²³ The language quoted above was not conspicuous.²⁴ Second, the expression "as is" pertained solely to the marine heads and not to the general condition of the boat.²⁵

On remand in this case, the trial court's treatment of the above-quoted document will affect the decision whether the sale was "as is." It should be clear that the seller may not prove by way of the document alone that the sale was "as is" because the language in the document is not conspicuous and because it may not refer to anything more than the marine heads. Nevertheless, the seller should probably be able to offer other evidence, including parol evidence, tending to establish that the transaction was understood to be "as is" and without an implied warranty of merchantability.²⁶ No parol evidence rule problem would seem to be presented because the seller would not be attempting to contradict a term in the writing; he would simply be trying to show the surrounding circumstances to prove that the buyer understood the language in the document, and that it was not intended to cover only marine heads. The same problem may arise with respect to the implied warranty of fitness for a particular purpose, although there may be an additional complication on remand: section 2-316 requires that any disclaimer of the warranty of fitness be in writing.²⁷ It could be argued that this writing requirement affects the extent to which a writing, not sufficient in itself, can be explained or shown to be the basis on which the parties bargained.

4. *Battle of the Forms.*—One of the best-known U.C.C. provisions is section 2-207²⁸—the drafters' treatment of the historic "battle of the forms." In *Uniroyal, Inc. v. Chambers Gasket & Manufacturing Co.*,²⁹ the Indiana Court of Appeals had occasion to decide a case involving the "battle of the forms" and, in the process, made a

²³384 N.E.2d at 1094. Some jurisdictions, including Indiana, have held that the conspicuousness requirement applies not only to the use of the word "merchantability," but also to the use of expressions such as "as is." In other words, language must be conspicuous whenever the seller attempts to show that warranties have been disclaimed by means of the writing alone. See, e.g., *Osborne v. Genevie*, 289 So. 2d 21 (Fla. Dist. Ct. App. 1974); *Woodruff v. Clark County Farm Bureau Coop. Ass'n*, 153 Ind. App. 31, 286 N.E.2d 188 (1972); *Fairchild Indus. v. Maritime Air Serv., Ltd.*, 274 Md. 181, 333 A.2d 313 (1975); *Gindy Mfg. Corp. v. Cardinale Trucking Corp.*, 111 N.J. Super. 383, 268 A.2d 345 (1970).

²⁴The Indiana definition of "conspicuous" is found in IND. CODE § 26-1-1-201(10) (1976).

²⁵384 N.E.2d at 1094.

²⁶See *Smith v. Sharpsteen*, 521 P.2d 394 (Okla. 1974).

²⁷U.C.C. § 2-316(2). See IND. CODE § 26-1-2-316(2) (1976).

²⁸See IND. CODE § 26-1-2-207 (1976).

²⁹380 N.E.2d 571 (Ind. Ct. App. 1978).

significant contribution to the literature on the subject. In *Uniroyal*, the buyer, Chambers, sent an order form to the seller, Uniroyal, to arrange for the purchase of material used in fabricating gaskets. Uniroyal responded with an "order acknowledgement," apparently a preprinted form, which contained the following statement:

WE ACKNOWLEDGE AND THANK YOU FOR YOUR ORDER. OUR ACCEPTANCE OF THE ORDER IS CONDITIONAL ON THE BUYER'S ACCEPTANCE OF THE CONDITIONS OF SALE PRINTED ON THE REVERSE SIDE HEREOF. IF BUYER DOES NOT ACCEPT THESE CONDITIONS OF SALE, HE SHALL NOTIFY SELLER IN WRITING WITHIN SEVEN (7) DAYS AFTER RECEIPT OF THIS ACKNOWLEDGEMENT.³⁰

Various "conditions of sale" were printed on the reverse side of the acknowledgement form, including disclaimers of warranty³¹ and limitations of remedy.³² Chambers did not object to any of these printed terms on the acknowledgement form. To the contrary, Uniroyal delivered goods pursuant to this arrangement, and Chambers accepted them. When defects in the goods were discovered, Chambers sued Uniroyal claiming that the defects constituted breach of warranty. Among other things, Uniroyal argued that the terms on the acknowledgement form excluded warranties and limited remedies. Curiously, the trial court enforced some of the "conditions of sale" but concluded that others were not enforceable.³³

The court of appeals reversed the trial judge's decision on the efficacy of these "conditions of sale" on the following reasoning. The original order form was an offer,³⁴ but Uniroyal's acknowledgement form did not operate as an acceptance because the form expressly conditioned acceptance on Chambers' assent to the "conditions of sale"—terms which would have changed the contract contemplated by Chambers' order form in substantial ways. Thus, no contract was created at the time these forms were exchanged. Furthermore, Chambers' acceptance of the goods did not constitute assent to the conditions of sale. In reaching this conclusion, the court of appeals rejected what has been called the "last shot" principle³⁵ under which

³⁰*Id.* at 573.

³¹*See* IND. CODE § 26-1-2-316 (1976).

³²*See id.* § 26-1-2-719.

³³380 N.E.2d at 577.

³⁴Despite the trial court's finding that Chambers' offer expressly limited acceptance to the terms of the offer, the court of appeals found that Chambers' purchase order form included only terms of price, quantity, and shipment date. *Id.*

³⁵*Id.* at 578. The "last shot" principle requires that there be a fixed moment in

that party wins whose form was last sent prior to shipment of the goods. Instead, the court recognized that even though the documents exchanged between the parties did not create a contract, their conduct nonetheless could serve as a basis for enforcement of the contract between the parties.³⁶ In this case, delivery and acceptance of the goods made inescapable the conclusion that there was an agreement. According to section 2-207(3),³⁷ the terms of this contract implied by conduct were not fixed by the form of either party, but were those terms upon which the exchanged documents agreed (usually the central or "dickered" terms such as quantity, price, and delivery times which are written on the forms by both buyer and seller) along with any supplementary terms provided by the "gap filler" provisions of the Code.³⁸ In *Uniroyal*, the forms of Chambers and Uniroyal did not agree on matters which the trial judge apparently concluded were governed by Uniroyal's form. Thus, the trial judge erred in imposing those terms.

One interesting aspect of the *Uniroyal* case involves the preemptive effect of the conditional language in Uniroyal's acknowledgement form. The question is whether a form containing such language of condition could ever serve as a definite and seasonable expression of acceptance and cause the parties to be bound when sent. It could be that, despite its conditional language, the seller's acknowledgement form in *Uniroyal* actually may have been intended as an expression of acceptance. Such a possibility would be heightened if the parties had engaged in similar transactions over a period of time using the same form—something which appears to have existed in *Uniroyal*.³⁹ This sequence of conduct could indicate a course of dealing⁴⁰ between the parties which would demonstrate their intention to attach no significance to the language on the seller's printed form. This might have been the case if

time when a contract comes into existence. Thus, the last document exchanged between the parties is treated as the offer, and the receipt of the goods is treated as the acceptance. Hence the expression "last shot," because the party who "fired the last shot," that is, sent the last document, will be the victor of the "battle of the forms." For an application of the principle, see *Roto-Lith, Ltd. v. F.P. Bartlett & Co.*, 297 F.2d 497 (1st Cir. 1962).

³⁶380 N.E.2d at 578. See IND. CODE § 26-1-2-207(1) (1976).

³⁷IND. CODE § 26-1-2-207(3) (1976).

³⁸380 N.E.2d at 578. "Gap fillers" are those terms which are supplied by U.C.C. guidelines and the courts in the absence of agreement between the parties. The expression seems to have been coined by Professors White and Summers. See J. WHITE & R. SUMMERS, *supra* note 2, §§ 3-4 to -8. The gap filler provisions include standards for use by the courts when the parties fail to agree on time of delivery, U.C.C. § 2-309; place of delivery, *id.* § 2-308; price, *id.* § 2-305; and the implied warranty of merchantability, *id.* § 2-314.

³⁹380 N.E.2d at 574.

⁴⁰See IND. CODE § 26-1-1-205(1) (1976).

Uniroyal had consistently accepted responsibility for defects which the acknowledgement form excluded from the scope of its responsibilities. In *Uniroyal*, the court seemed to conclude as a matter of law that the acknowledgement form could not operate as an acceptance and did not seem to leave any room on remand for the trial court to consider these possibilities. Thus, it may be that draftsmen will be able to rely on this type of printed language in an acknowledgement form in all cases to prevent a contract from being formed at the time that the documents are exchanged. Although this result has the salutary effect of preventing one party from winning the "battle of the forms," it may create problems when a buyer chooses not to go through with a contract after the exchange of documents but before delivery of the goods.⁴¹

5. *Vouching In.*—U.C.C. section 2-607(5) provides a "vouching in" procedure—a method by which an aggrieved buyer can exert pressure on his seller to defend an action against the buyer based on some defect in the goods. For example, assume that *S* sold goods to *B*, who in turn sold the goods to *B2*. *B2* discovered defects in the goods and filed suit against *B* for breach of warranty. In this situation, *B* would want to be considered only a middleman; he would want responsibility for defending the condition of the goods to lie with *S*, the original seller. U.C.C. section 2-607(5)(a) gives *B* a right to notify *S* in writing that *B2* has filed suit for breach and to demand that *S* defend the action on penalty of being bound in any suit against him by *B* "by any determination of fact common to the two litigations."⁴²

In *Uniroyal*, Chambers resold the goods which Uniroyal had supplied to Thrush. Thrush, upon discovering defects in the goods, brought suit against Chambers for breach of warranties. Chambers gave notice to Uniroyal to come in and defend Thrush's suit.⁴³ At the same time, Chambers joined Uniroyal in the original action by Thrush. By agreement of the parties, the suit by Thrush against Chambers was tried first. The trial court made findings of fact and entered judgment in favor of Thrush. Thereafter, the trial judge granted a motion for summary judgment in favor of Chambers against Uniroyal.⁴⁴ On appeal, Uniroyal argued that summary judgment was improper because: (1) the "vouching in" procedure was not binding on a seller who had been impleaded, and (2) even if Uniroyal

⁴¹To the extent that draftsmen may avoid the effects of U.C.C. § 2-207(1) with printed language, a species of the mirror image principle survives—precisely the vice which the draftsmen of § 2-207 sought to eliminate.

⁴²U.C.C. § 2-607(5)(a).

⁴³380 N.E.2d at 574.

⁴⁴*Id.* at 579.

were bound by determinations of fact in the suit between Chambers and Thrush, there were issues of fact not litigated in that action.⁴⁵ The court of appeals dismissed the first argument, concluding that the “vouching in” procedure was effective notwithstanding Chambers’ use of impleader.⁴⁶ The fact that Uniroyal had been impleaded did not prevent it from taking over the defense in the original action by Thrush against Chambers. The court held, however, that a genuine issue of fact rendered summary judgment inappropriate.⁴⁷ Even though some issues of fact had been determined in the suit by Thrush against Chambers, the issue whether the condition of the goods had changed after delivery to Thrush remained for disposition. Because the trial judge had made no finding on that question, summary judgment was inappropriate.⁴⁸

The court’s decision makes it clear that when the original seller is “vouched in,” the consequence of his failure to accept responsibility for defense of the initial suit will not be an automatic entry of judgment in a suit by his buyer. The buyer will still have to establish at least that (1) *B* purchased the goods from *S*, (2) *B* sold the goods to *B2* subject to the warranties made by *S*, (3) *B2* “was able to obtain a judgment against” *B*,⁴⁹ (4) *B* properly “vouched in” *S*, (5) *S* declined to assume the defense, (6) *B* paid the judgment to *B2*, and (7) no change occurred in the condition of the goods. The seller may raise a number of defenses in this type of litigation. For example, he may argue that (1) *B* did not purchase the goods from *S*, (2) no warranties were made by *S* to *B* or remedies were limited by agreement, (3) *B* failed to give proper notice of breach of warranty, (4) no loss was suffered by *B*, or (5) the condition of the goods changed after delivery to *B* by *S*.

6. *Properly Payable Checks.*—Important rights can hinge on whether a check is properly payable. If a check is properly payable, the bank on which it is drawn will be able to charge it against the customer’s account.⁵⁰ This is true even though that charge creates an overdraft in the customer’s account.⁵¹ If, on the other hand, a check is not properly payable, any payment made by the bank will not concern the customer and should not result in a charge against the customer’s account. For example, a check bearing a forged payee’s endorsement probably would not be properly payable and

⁴⁵*Id.*

⁴⁶*Id.* at 580-81.

⁴⁷*Id.* at 581-82.

⁴⁸*Id.*

⁴⁹*Id.* at 580.

⁵⁰U.C.C. § 4-401(1).

⁵¹*Id.*

the payor bank would not be entitled to charge the customer's account in the amount of the check.⁵²

In *Lincoln National Bank & Trust Co. v. Peoples Trust Bank*,⁵³ the Indiana Court of Appeals addressed an interesting problem concerning whether a check was properly payable. On December 3, Wyss drew a check on his account with the Lincoln Bank payable to Rudisill Motors. Wyss delivered the check to Allan, who was apparently the principal officer and owner of Rudisill Motors. Sometime before December 3, Wyss' attorney had notified an officer of the Lincoln Bank that Wyss was not mentally sound and that the bank should not honor any checks of Wyss. On December 3, Allan attempted to cash the check at a branch office of Lincoln Bank, but the bank dishonored it, apparently because the account on which it was drawn did not have sufficient funds. After banking hours, Allan presented the check to a BankAmericard teller at Lincoln Bank's main office and endorsed the check, apparently as principal officer of Rudisill. The teller accepted the check, credited part of the amount to Allan's BankAmericard account, and issued a cashier's check made payable to Allan for the balance. The check created a substantial overdraft in the account of the drawer, Wyss. Wyss died less than two months later and Lincoln Bank set off the amount of the overdraft against other funds Wyss had on deposit. Wyss' estate sued Lincoln Bank, claiming that Wyss' check was not properly payable and that Lincoln Bank had no right to effect a set-off against Wyss' other account. The trial court agreed with the estate and entered judgment against Lincoln Bank in the amount of the check.⁵⁴

The court of appeals reversed on this issue, concluding as a matter of law that the check was properly payable.⁵⁵ The court stated that the fact that the check resulted in an overdraft did not affect its status as a properly payable instrument.⁵⁶ The fact that Wyss' attorney had notified Lincoln Bank that Wyss was not mentally sound did not prevent Lincoln from paying the check. The bank's authority to pay would have been revoked only if the bank had known "of an adjudication of incompetence and [had] a reasonable opportunity to act on it."⁵⁷ In this case, Wyss was never adjudicated incompetent.

⁵²Whaley, *Forged Indorsements and the U.C.C.'s "Holder,"* 6 IND. L. REV. 45, 46 (1972).

⁵³379 N.E.2d 527 (Ind. Ct. App. 1978).

⁵⁴*Id.* at 529.

⁵⁵*Id.* at 530.

⁵⁶*Id.* at 529 (citing IND. CODE § 26-1-4-401 (1971) (current version at *id.* § 26-1-4-401 (1976))).

⁵⁷379 N.E.2d at 530 (quoting IND. CODE § 26-1-4-405 (1971) (current version at *id.* § 26-1-4-405 (1976))).

Wyss' lawyer's instruction not to pay the check did not amount to a stop payment order because there was no indication that the lawyer had acted on the drawer's instructions.⁵⁸ The fact that the check was paid in violation of an internal bank rule, which required managerial approval before a teller could cash or certify a check over \$500, was not relevant to the question whether the check was properly payable. The court refused to permit internal rules designed for bank protection to be invoked for the benefit of the drawer or his estate.⁵⁹ Similarly, the fact that the check had been dishonored earlier in the day did not affect its status as a properly payable instrument.⁶⁰ Finally, the court held that Lincoln Bank was not negligent in cashing Wyss' check with knowledge of his mental instability.⁶¹ Although the bank had been requested to "monitor" the drawer's account before presentment of the check, the duty to "monitor" did not generate a duty to dishonor checks which were otherwise properly payable.⁶²

The court of appeals did not seem to consider whether the trial court's decision could be justified on the ground that Lincoln Bank had acted in bad faith. Section 1-203 provides that "every contract or duty . . . imposes an obligation of good faith in its performance . . ."⁶³ As to banks, this obligation cannot be disclaimed by agreement.⁶⁴ Under circumstances slightly different from those at issue, U.C.C. section 4-404⁶⁵ specifies that a bank has the right to charge a customer's account only if the bank paid the item in good faith. This limitation operates even though the item is otherwise properly payable.

7. *Indorsers' Commitments.*—In *American National Bank & Trust Co. v. St. Joseph Valley Bank*,⁶⁶ the Indiana Court of Appeals dealt with an issue concerning the responsibility of indorsers on a check. The problem began when John and Nancy Augustine agreed to borrow money from the South Bend Federal Savings and Loan Association (South Bend) to pay Hanover Homes Corporation (Hanover) for the construction of a home on the Augustine's prop-

⁵⁸379 N.E.2d at 530 (citing IND. CODE § 26-1-4-403 (1971) (current version at *id.* § 26-1-4-403 (1976)). Section 4-403 provides that a "customer" may by order stop payment. It does not appear that the lawyer would have been a customer of the bank with respect to this check and account unless he were acting on the specific instructions of the drawer.

⁵⁹379 N.E.2d at 529-30.

⁶⁰*Id.* at 530.

⁶¹*Id.*

⁶²*Id.*

⁶³IND. CODE § 26-1-1-203 (1976).

⁶⁴*Id.* § 26-1-4-103(1).

⁶⁵*Id.* § 26-1-4-404(1).

⁶⁶389 N.E.2d 379 (Ind. Ct. App. 1979).

erty. South Bend paid the proceeds of the loan to the Augustines by three checks. The last of those checks was made payable to John Augustine, Nancy Augustine, and Hanover. Only John Augustine and Hanover indorsed the check, which was deposited in Hanover's account at the St. Joseph Valley Bank (St. Joseph). St. Joseph forwarded the check for collection and the American National Bank and Trust Company, the payor bank, paid the check. South Bend, upon discovering Nancy Augustine's failure to indorse the check, notified American, which reccredited South Bend's account in the amount of the check. American sued St. Joseph, which in turn impleaded John and Nancy Augustine, alleging liability on the basis of transfer commitments made in connection with the check. After a bench trial the court held in favor of St. Joseph in its third-party action against the Augustines. The court of appeals reversed, finding no basis in the record for recovery against either John or Nancy Augustine.⁶⁷

In reviewing the decision of the trial judge, the court of appeals rejected the claim that John Augustine had made an indorser's contract which ran in favor of St. Joseph.⁶⁸ John did indorse the check before its deposit. Nevertheless, the court of appeals, quoting Indiana Code section 26-1-3-414(1),⁶⁹ emphasized that an indorser's contract runs only in favor of a "holder."⁷⁰ That section states that the "indorser engages that upon dishonor . . . he will pay the instrument . . . to the holder or to any subsequent indorser who takes it up" ⁷¹ The court observed that St. Joseph did not qualify as a holder because of the missing indorsement and thus could not recover on the indorser's contract made by John Augustine.⁷² In addition, the court noted that no dishonor occurs when a payor bank returns an instrument for lack of proper indorsement.⁷³ In the absence of dishonor, the indorser's contract liability is not activated.

The court's conclusion that the contract liability of an indorser extends only to holders seems to be based on a narrow reading of section 3-414. The draftsmen may have used the word "holder" in section 3-414(1) to describe generally the type of liability undertaken by an indorser rather than to specifically limit liability to those per-

⁶⁷*Id.* at 381.

⁶⁸*Id.* at 382.

⁶⁹IND. CODE § 26-1-3-414(1) (1976). *See* U.C.C. § 3-414(1).

⁷⁰389 N.E.2d at 382.

⁷¹IND. CODE § 26-1-3-414(1) (1976).

⁷²389 N.E.2d at 382. The court correctly pointed out that a check made payable to more than one payee cannot be negotiated save by endorsement of all parties. The transferee of an instrument cannot become a holder except through the process of negotiation. *Id.* (citing IND. CODE § 26-1-1-201(20), -3-116(b) (1976)). *See also* IND. CODE § 26-1-3-202.

⁷³389 N.E.2d at 382 (citing IND. CODE § 26-1-3-507 (1976)).

sons who qualify as holders. If an indorser's contract liability were to run only to those who qualified as holders, an indorser would incur no liability when an instrument proved to be, for technical reasons, non-negotiable.⁷⁴ Likewise, in a case of transfer of the instrument over a forged indorsement, the taker and all subsequent takers probably would not qualify as holders.⁷⁵ Furthermore, the indorser's liability under section 3-414(1) extends to any "subsequent indorser who takes it up."⁷⁶ The section does not appear to require that the subsequent indorser also be a holder. Thus, if St. Joseph could establish itself as a subsequent indorser it might be entitled to recover on the indorser's contract even under a narrow reading of section 3-414. St. Joseph's status as a subsequent indorser would seem to depend on whether St. Joseph had supplied an indorsement in the course of the collection process. The furnishing of an indorsement during collection is a somewhat accidental event and a tenuous basis for determining those entitled to sue on an indorser's contract. This observation further supports the view that the language of section 3-414 was not designed to limit liability to persons who qualify as holders.

One other feature of the case is worth noting. The trial court entered judgment against Nancy Augustine even though she had not signed the instrument as an indorser.⁷⁷ This decision may have been based on the assumption that Nancy was a transferor of the instrument. Nancy was one of the persons who planned to pay for the construction work with the loan proceeds represented by the check and, in this role, could be viewed as a transferor. If Nancy were a transferor, section 3-201(3) might have come into play. Under that section, the transferee has "a specifically enforceable right to have the unqualified indorsement of the transferor."⁷⁸ If Nancy were treated as having made the indorsement because of the specifically enforceable right, she would be obligated on an indorser's contract, negotiation would have taken place, and St. Joseph would qualify as a holder.

C. Consumer Law

1. *Home Solicitation Sales.*—The Indiana Uniform Consumer Credit Code⁷⁹ provides that in a home solicitation sale the buyer has the right to cancel the sales contract within what is usually referred

⁷⁴U.C.C. §§ 3-102(e), -104, -202.

⁷⁵See Whaley, *supra* note 52, at 58.

⁷⁶U.C.C. § 3-414(1).

⁷⁷389 N.E.2d at 381.

⁷⁸IND. CODE § 26-1-3-201(3) (1976).

⁷⁹*Id.* §§ 24-4.5-1-101 to -6-203 (1976 & Supp. 1979).

to as a three-day cooling off period.⁸⁰ A home solicitation sale is defined as "a consumer credit sale of goods, other than farm equipment, or services in which the seller or a person acting for him engages in a personal solicitation of the sale at a residence of the buyer and the buyer's agreement or offer to purchase is there given to the seller"⁸¹

The 1979 session of the Indiana Legislature added two new dimensions to this definition of home solicitation sale. First, the definition of home solicitation sale has been amended to include "a personal solicitation of the sale, including a solicitation over the telephone, at a residence of the buyer"⁸² Thus, the personal solicitation can be by telephone as well as by personal visit to the home. Second, the definition of home solicitation sale now encompasses a sale solicited "in a city . . . in which the seller does not have a permanent business establishment, through mailings, advertisements, or telephone calls, which require the buyer to meet the seller . . . at a place other than the seller's permanent business establishment."⁸³ The second amendment covers the case of a company which sells its products by setting up a temporary place of business in a city in which the company has no permanent business establishment. For example, a Chicago company selling suits from Hong Kong might sell its wares through a salesman in a motel in Lebanon, Indiana. Such a sale would be a home solicitation sale, even though not in the buyer's home, and the buyer would have the benefit of the cooling off period.

2. *Electronic Fund Transfer Services.*—Electronic fund transfer services, which have been offered to the public more and more frequently in the recent past, are found in at least four different forms. First, there are automated tellers, or twenty-four hour bank tellers, which enable bank customers to engage in various banking transactions at a remote terminal. Computers rather than bank employees operate these twenty-four hour terminals. Second, there are systems which permit customers to transfer money between bank accounts or make payments from a bank account by telephone. For example, a customer might transfer money from a savings account into a checking account by telephone in order to cover a check she has written. Third, there are automatic payment and receipt mechanisms whereby payments can be made directly from the account of a customer to regular creditors or money paid

⁸⁰*Id.* § 24-4.5-2-502 (1976).

⁸¹*Id.* § 24-4.5-2-501.

⁸²Act of Apr. 9, 1979, Pub. L. No. 237, 1979 Ind. Acts 1132 (codified at IND. CODE § 24-4.5-2-501 (Supp. 1979)).

⁸³*Id.* at 1132-33 (codified at IND. CODE § 24-4.5-2-501 (Supp. 1979)).

for the account of a customer can be deposited directly into the customer's bank account. An example of a payment mechanism is found in those services by which utility bills or insurance premiums can be deducted automatically on a periodic basis from the customer's bank account. Finally, there are point-of-sale electronic transfers which involve a direct electronic deduction from the customer's account for the amount of the purchase. Thus, a discount house might make an electronic deduction from a customer's bank account at the time of purchase of a television set.

Although electronic terminal systems are relatively new, they have become quite popular. As of last year, there were 8,000 automated teller machines in operation in the United States, each of which averaged nearly 2,000 electronic fund transfers per month. Approximately 100 financial institutions offered pay-by-phone services and, in 1977, the Treasury Department electronically deposited over 60 million social security and elderly income maintenance payments.⁸⁴

Some persons concerned with electronic fund transfer services argued that enactment of regulatory laws at this time would be premature because the newly developed electronic fund transfer services have not yet taken on specific forms. They suggested that to initiate regulation now might inhibit development and improperly influence the type of services provided.⁸⁵ Congress ignored this reservation and on November 10, 1978, enacted the Electronic Fund Transfer Law (EFT).⁸⁶ EFT forms a new part of the Consumer Credit Protection Act (CCPA)⁸⁷ and deals in general with anticipated problems concerning electronic fund transfer.

In this brief review, no effort will be made to analyze each provision of the new law. What follows is only a summary of some of the more significant provisions.

a. Issuance of cards.—Problems created by distribution of unsolicited credit cards led Congress to enact section 132 of the CCPA.⁸⁸ This section prohibits issuance of a credit card except as a

⁸⁴SENATE COMM. ON BANKING, HOUSING, AND URBAN AFFAIRS, FAIR FUND TRANSFER ACT, S. REP. NO. 915, 95th Cong., 2d Sess. 2, reprinted in [1978] U.S. CODE CONG. & AD. NEWS 9403, 9404.

⁸⁵*Id.* at 20-22, U.S. CODE CONG. & AD. NEWS 9421-23 (additional views of Messrs. Schmitt, Tower, Morgan, Garn, and Lugar).

⁸⁶15 U.S.C.A. §§ 1693-1693r (West Supp. 1979). Some parts of EFT became effective 90 days after enactment. Those provisions having to do with unauthorized transfer and restrictions on issuance of cards took effect on February 10, 1979. The remainder of the new law will not become effective until May 10, 1980.

⁸⁷15 U.S.C. §§ 1601-1692o (1976 & Supp. I 1977); 15 U.S.C.A. §§ 1601-1693r (West Supp. 1979).

⁸⁸15 U.S.C. § 1642 (1976).

renewal or in response to a request or application.⁸⁹ EFT operates on the same premise except that it provides one opportunity for financial institutions to avoid the general prohibition against unsolicited issuance and to promote the use of electronic fund transfer mechanisms. Under EFT, financial institutions may distribute, on an unsolicited basis, cards, codes, or other means of access for use in initiating electronic fund transfers upon fulfillment of certain conditions.⁹⁰ First, the card or other means of access must not be validated.⁹¹ This provision appears to require that the consumer make some additional request before the card or means of access can be used to initiate an electronic fund transfer. Second, the distribution must be accompanied by all the disclosures required under EFT.⁹² Third, the distribution must be accompanied by a clear explanation of how the customer may dispose of the card or other means of access if he does not choose to have it validated.⁹³ Finally, validation of the card or means of access is permitted only in response to a request from the consumer, upon confirmation of the consumer's identity.⁹⁴ According to the senate committee report, this provision on unsolicited distribution "is intended to permit financial institutions to develop a sufficient card base while also protecting a consumer's account from unauthorized access by a thief who has intercepted the consumer's mail."⁹⁵

b. Disclosure.—EFT requires disclosure, in accordance with regulations of the Federal Reserve Board, of the terms and conditions of electronic fund transfers.⁹⁶ Disclosures must be made in readily understandable language at the time the consumer contracts for an electronic fund transfer service⁹⁷ and may be made by model clauses published by the Board.⁹⁸ To the extent applicable to the transaction, the disclosures must include the following:⁹⁹ the con-

⁸⁹*Id.*

⁹⁰15 U.S.C.A. § 1693i(b) (West Supp. 1979) (effective February 10, 1979).

⁹¹*Id.* § 1693i(b)(1).

⁹²*Id.* § 1693i(b)(2).

⁹³*Id.* § 1693i(b)(3).

⁹⁴*Id.* § 1693i(b)(4).

⁹⁵SENATE COMM. ON BANKING, HOUSING, AND URBAN AFFAIRS, FAIR FUND TRANSFER ACT, S. REP. NO. 915, 95th Cong., 2d Sess. 16, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 9403, 9418.

⁹⁶15 U.S.C.A. § 1693c(a) (West Supp. 1979) (effective May 10, 1980).

⁹⁷*Id.*

⁹⁸*Id.* § 1693b(b) provides that "[t]he Board shall issue model clauses for optional use by financial institutions to facilitate compliance with the disclosure requirements"

⁹⁹The Board will be making final the regulations which will explicitly state all the necessary disclosures. No effort has been made to discuss the proposals now pending before the Board concerning these disclosures. *See* 44 Fed. Reg. 18,481 (1979).

sumer's potential liability for unauthorized use of a code, card, or other means of access;¹⁰⁰ the telephone number and address of the person to be contacted in case the consumer believes there has been an unauthorized use;¹⁰¹ the kinds of transfers which the consumer may initiate;¹⁰² the charges which can be made for transfers or the right to make transfers;¹⁰³ the consumer's right to stop payment of preauthorized transfers and the procedure to be followed in stopping payment;¹⁰⁴ the consumer's right to receive documentation of transfers;¹⁰⁵ a summary of the error resolution procedure;¹⁰⁶ the liability of financial institutions for unauthorized transfers;¹⁰⁷ and the circumstances under which the financial institution will disclose information about the consumer's account to third persons.¹⁰⁸ If a financial institution changes any term or condition of a consumer's account, it must give notice in writing at least twenty-one days prior to the effective date of the change. However, no such notice is necessary if the change in terms will not result in increased costs for the consumer or reduced access to the consumer's account.¹⁰⁹

c. Documentation of transfers and periodic statements.—EFT section 906¹¹⁰ provides that the financial institution must furnish written verification of transactions in at least three different situations. First, the financial institution must provide written documentation of any transfer initiated by a consumer at an electronic terminal at the time the transfer is initiated.¹¹¹ The documentation must specify the amount, date, and type of transaction; the location or identification of the terminal; the identity of the consumer's account to or from which a transfer was made; and the identity of any third party to or from whom a transfer was made.¹¹² This provision amounts to a requirement that a receipt be issued for every automated teller or point-of-sale transfer and furnishes the consumer with a reminder as well as a document for recordkeeping. Second, the financial institution must give notice to a consumer whose account is credited by a preauthorized electronic fund transfer from the same payor on a regular basis.¹¹³ The purpose of this notice is to

¹⁰⁰15 U.S.C.A. § 1693c(a)(1) (West Supp. 1979) (effective May 10, 1980).

¹⁰¹*Id.* § 1693c(a)(2).

¹⁰²*Id.* § 1693c(a)(3).

¹⁰³*Id.* § 1693c(a)(4).

¹⁰⁴*Id.* § 1693c(a)(5).

¹⁰⁵*Id.* § 1693c(a)(6).

¹⁰⁶*Id.* § 1693c(a)(7).

¹⁰⁷*Id.* § 1693c(a)(8).

¹⁰⁸*Id.* § 1693c(a)(9).

¹⁰⁹*Id.* § 1693c(b).

¹¹⁰*Id.* § 1693d.

¹¹¹*Id.* § 1693d(a).

¹¹²*Id.* § 1693d(a)(1)-(a)(5).

¹¹³*Id.* § 1693d(b).

inform the consumer that the funds are available for use. The financial institution may elect to provide positive notice to the consumer when the credit is made as scheduled, or negative notice when the credit is not made as scheduled. The financial institution must disclose the means of notice at the time the consumer enters into an electronic fund transfer agreement. Finally, financial institutions must provide periodic statements for any account which may be accessed by electronic fund transfer.¹¹⁴ These statements must be furnished every three months or more frequently to coincide with a "cycle," but in no case will they be required more often than monthly. The statements may include other information which is relevant to a consumer's account, but must specify: (1) all information required for a transaction initiated at an electronic terminal,¹¹⁵ (2) the amount of any charge imposed during the period for electronic fund transfers or account maintenance, (3) beginning and ending balances in the account, and (4) the address and telephone number to be used by the consumer in making inquiries or giving notice of error.¹¹⁶

This documentation serves a dual purpose. Not only does it facilitate consumer awareness and recordkeeping, but also it constitutes admissible evidence and prima facie proof of an electronic fund transfer to another person.¹¹⁷ For example, in proving payments deductible under the federal income tax laws, the documentation will serve as would a cancelled check.

d. Preauthorized transfers.—Some electronic fund transfers involve regular payments from a consumer's bank account. For example, a consumer might arrange to pay insurance premiums or utility bills by having amounts deducted directly from his bank account at regular intervals and transferred electronically to the insurance or utility company. EFT section 907¹¹⁸ states that authorization for this type of transfer must be given in writing by the consumer and that a copy of the authorization must be provided to the consumer when it is made.¹¹⁹ In addition, the consumer may stop payment of a preauthorized electronic transfer by giving the financial institution either oral or written notice at any time up to three business days before the scheduled payment date.¹²⁰ If the consumer provides oral notice to stop payment, the financial institution may require that the consumer furnish written confirmation within fourteen days of

¹¹⁴*Id.* § 1693d(c).

¹¹⁵*Id.* § 1693d(c)(1). The required information is described in *id.* § 1693d(a). See text accompanying notes 65-66 *supra*.

¹¹⁶15 U.S.C.A. § 1693d(c)(2)-(c)(4) (West Supp. 1979) (effective May 10, 1980).

¹¹⁷*Id.* § 1693d(f).

¹¹⁸*Id.* § 1693e.

¹¹⁹*Id.* § 1693e(a).

¹²⁰*Id.*

the oral notification.¹²¹ The requirement of written confirmation applies only to the extent that the financial institution advises the consumer of it when he gives oral notification. If the amount to be paid is not fixed in advance, the financial institution or designated payee must give reasonable advance notice to the consumer, in accordance with regulations of the Board, of the amount to be transferred and the projected date of transfer.¹²²

e. Unauthorized transfers.—Unauthorized electronic fund transfers create problems which can be seen best by example. Take the case of a consumer with a card and access code which permit her to withdraw cash from her account through an automated teller. Assume that the card and access code are lost or stolen and fall into the hands of someone who uses them to draw all the funds, without authority, from her account. The loss of a total account balance could be devastating to a consumer.

This type of loss would be similar to the loss associated with the unauthorized use of credit cards. Of course, nearly ten years ago Congress enacted section 133 of the CCPA to protect cardholders against ruinous loss from unauthorized credit card use.¹²³ Nevertheless, CCPA section 133 does not give the cardholder complete protection; it creates an incentive for the cardholder to avoid loss or theft of cards and to report losses promptly by making him responsible for fifty dollars of unauthorized charges under certain circumstances.¹²⁴ Congress borrowed heavily from this credit card provision in creating protection for consumers against unauthorized electronic fund transfers.¹²⁵

EFT protects consumers from liability only if an electronic transfer is unauthorized.¹²⁶ The new law defines "unauthorized electronic fund transfer" as a "transfer from a consumer's account initiated by a person other than the consumer without actual authority to initiate such transfer and from which the consumer receives no benefit"¹²⁷ The expression does not include cases in which the consumer has authorized another person to use his card and access code, even though the other person's use of the card exceeds authority given.¹²⁸ Also, the expression does not encompass transac-

¹²¹*Id.*

¹²²*Id.* § 1693e(b).

¹²³Pub. L. No. 91-508, § 502(a), 84 Stat. 1126 (1970) (codified at 15 U.S.C. § 1643 (1976)).

¹²⁴*Id.*

¹²⁵SENATE COMM. ON BANKING, HOUSING, AND URBAN AFFAIRS, FAIR FUND TRANSFER ACT, S. REP. NO. 915, 95th Cong., 2d Sess. 6, reprinted in [1978] U.S. CODE CONG. & AD. NEWS 9403, 9408.

¹²⁶15 U.S.C.A. § 1693g (West Supp. 1979) (effective February 10, 1979).

¹²⁷*Id.* § 1693a(11) (West Supp. 1979) (effective May 10, 1980).

¹²⁸*Id.* § 1693a(11)(A).

tions initiated fraudulently by the consumer¹²⁹ or transfers which result from error made by a financial institution.¹³⁰

It is interesting to note that under EFT a transfer is unauthorized only if it is made "without actual authority."¹³¹ The quoted language suggests that if a wrongdoer had apparent authority the use would still be unauthorized. This definition would appear to mark a significant departure from the CCPA provision on credit cards which states that use is authorized if the wrongdoer had apparent authority.¹³² EFT provides for this situation, however, by excluding from the definition of unauthorized transfers those cases in which the consumer has furnished the card and code to another person.¹³³ EFT's definition of unauthorized transfers may constitute a better way to circumscribe consumer protection than CCPA's use of the doctrine of apparent authority.

If an electronic transfer is unauthorized, EFT accords protection, but the protection is limited just as it is for credit cardholders.¹³⁴ The consumer is responsible for the lesser of fifty dollars or the amount of money transferred in the unauthorized transaction before the financial institution receives notice or learns of circumstances which give it the reasonable belief that there has been or may be an unauthorized transfer.¹³⁵ This liability, like the liability imposed on cardholders for unauthorized use, is designed to insure that the consumer will carefully protect cards and access codes and promptly report losses.¹³⁶ Finally, there are some conditions to this limited liability. The financial institution will be able to impose the limited liability only if the card was accepted¹³⁷ and if

¹²⁹*Id.* § 1693a(11)(B).

¹³⁰*Id.* § 1693a(11)(C).

¹³¹*Id.* § 1693a(11).

¹³²15 U.S.C. § 1602(o) (1976).

¹³³15 U.S.C.A. § 1693a(11)(A) (West Supp. 1979).

¹³⁴*Id.* § 1693g.

¹³⁵*Id.* § 1693g(a)(1)-(a)(2).

¹³⁶Congress did not include in EFT the sort of notification mechanism found in the provision for credit cards. CCPA § 133a provides that the card issuer must provide the cardholder with a self-addressed, prestamped notification which may be used by the cardholder in the event of loss. 15 U.S.C. § 1643(a) (1976). There is evidence that these prestamped notice forms have not been used. The Federal Reserve Board has proposed legislation, now pending in Congress, which would omit this provision. SENATE COMM. ON BANKING, FINANCE, AND URBAN AFFAIRS, TRUTH IN LENDING ACT, S. REP. NO. 108, 96th Cong., 1st Sess. 32 (1979).

¹³⁷15 U.S.C.A. § 1693g(a) (West Supp. 1979). The term "accepted card" means a card, code, or other means of access to a consumer's account for the purpose of initiating electronic fund transfers when the person to whom such card or other means of access was issued has requested and received or has signed or has used, or authorized another to use, such card or other means of access for the purpose of transferring money between accounts or obtaining money, property, labor, or services

Id. § 1693a(1) (West Supp. 1979) (effective May 10, 1980).

there is a means whereby the user can be identified as the person authorized to use the card.¹³⁸

Unlike the CCPA provision on credit cards, EFT creates two additional risks for the consumer which appear to be designed to encourage him to give notice of loss to the financial institution. Even though the transaction is unauthorized, the consumer will be responsible for losses beyond the fifty dollar limit which would not have occurred but for the consumer's failure to advise the financial institution of the unauthorized transaction within sixty days of transmittal of the statement on which that transaction is recorded.¹³⁹ In addition, the consumer will be liable "for losses which the financial institution establishes would not have occurred but for the failure of the consumer to report any loss or theft of a card or other means of access within two business days after the consumer learns of the loss or theft"¹⁴⁰ However, the consumer's failure to give notice will not result in liability for all losses. Liability is limited to the lesser of \$500 or the amount of unauthorized transfers made following the close of two business days after the consumer learns of the loss but before notice to the financial institution.¹⁴¹

In any litigation involving a consumer's liability for an unauthorized transfer, the burden of proof will be on the financial institution to establish that the transfer was authorized or, if unauthorized, that the card was accepted, that there is a method whereby the user's identity can be fixed, and that the disclosures pertinent to use of the card were made.¹⁴² Finally, it is clear that states may make laws more protective for consumers. EFT section 1693g(d) provides that "nothing in this section imposes liability upon a consumer for an unauthorized transfer in excess of his liability for such a transfer under applicable law or under any agreement with the consumer's financial institution."¹⁴³

f. Error resolution.—In 1974, Congress enacted the Fair Credit Billing Act,¹⁴⁴ which became a part of the CCPA. The provisions of the Act require creditors to respond to and resolve billing errors brought to their attention in writing by customers. EFT contains a procedure for resolving errors in electronic fund transfer systems¹⁴⁵ which bears some similarity to the Fair Credit Billing Act procedure. The EFT error resolution procedure, however, is more

¹³⁸*Id.* § 1693g(a).

¹³⁹*Id.*

¹⁴⁰*Id.*

¹⁴¹*Id.*

¹⁴²*Id.* § 1693g(b).

¹⁴³*Id.* § 1693g(d).

¹⁴⁴16 U.S.C. § 1666 (1976).

¹⁴⁵15 U.S.C.A. § 1693f (West Supp. 1979) (effective May 10, 1980).

rigorous from a creditor's viewpoint than that of the Fair Credit Billing Act.

The EFT error resolution procedure begins when the financial institution provides the consumer with documentation or notification of a transfer involving the consumer's account.¹⁴⁶ This is an event comparable to a creditor's sending a statement of the obligor's account under the Fair Credit Billing Act.¹⁴⁷ If the consumer finds an error in the documentation or notice he may give notice, either oral or written, setting forth his name and account number, his belief that the notice or documentation contains an error, the amount of the error, and the reasons for his belief.¹⁴⁸ The consumer must give the required notice within sixty days after transmission of notification or documentation by the financial institution. If the notice is oral, the financial institution may require written confirmation within ten business days. In order to impose this requirement, the financial institution must inform the consumer of it at the time of oral notice and must provide an address to which the confirmation should be sent.¹⁴⁹

Under either the Fair Credit Billing Act or EFT, the type of inquiry raised or grievance alleged by the consumer may be important because only certain events trigger the dispute resolution requirements. The Fair Credit Billing Act provisions define billing error narrowly.¹⁵⁰ For example, an alleged defect in the quality of a product accepted by a consumer does not constitute a billing error;¹⁵¹ hence, notification to the creditor of the defect will not trigger the billing error resolution procedure. Similarly, EFT's definition of error is limited. For purposes of the section dealing with error resolution,¹⁵² error comprises: (1) an unauthorized electronic fund transfer, (2) an incorrect transfer from or to a consumer's account, (3) an omission of a transfer from a statement, (4) a computational error, (5) receipt by the consumer of an incorrect amount of cash from a cash machine, (6) a request by the consumer for additional information, or (7) any other error described in regulations of the Board.¹⁵³ The consumer's grievance would have to fall into one of these categories to trigger the EFT resolution procedure.

¹⁴⁶*Id.* § 1693f(a).

¹⁴⁷*See id.* § 1666. Transmittal of the statement of the obligor's account must precede notice of a billing error which, in turn, requires the creditor to resolve the error pursuant to Board regulations.

¹⁴⁸*Id.* § 1693f(a)(1)-(a)(3).

¹⁴⁹*Id.* § 1693f(a).

¹⁵⁰Regulation Z, 12 C.F.R. § 226.2(j) (1978).

¹⁵¹*Id.*

¹⁵²15 U.S.C.A. § 1693f (West Supp. 1979) (effective May 10, 1980).

¹⁵³*Id.* § 1693f(f).

The receipt of notice of an error creates duties on the part of the financial institution which can be fulfilled by either one of two courses of action. On the one hand, the financial institution can investigate the alleged error and report the results of the investigation to the consumer within ten business days.¹⁵⁴ As an alternative, the financial institution can conditionally recredit the consumer's account for the amount in dispute within ten business days.¹⁵⁵ In that case, the financial institution has a period of forty-five days from receipt of notice within which to investigate and report. Of course, during that forty-five-day period the consumer is entitled to use the funds.¹⁵⁶

If the financial institution determines after investigation that the consumer's account was in error, it must make a correction in its records, including the crediting of interest when applicable, within one business day.¹⁵⁷ If the financial institution concludes that there was no error, it must provide the consumer with an explanation of its findings within three business days after its investigation.¹⁵⁸ Along with this report, the financial institution must include notice of the consumer's right to request reproductions of documents on which the financial institution relied in making its judgment. Thereafter, upon the consumer's request, the financial institution must promptly furnish reproductions of those documents.¹⁵⁹

The time periods described above appear to operate without taking into account the total time period available to the financial institution for conducting its investigation. For instance, if the financial institution were to recredit the consumer's account immediately on receipt of the notice of error, it would have forty-five days within which to complete its investigation and report.¹⁶⁰ However, if the investigation were completed sooner, the financial institution would be obligated to report before expiration of the forty-five-day period. The report would be required within one day of completion if an error were found,¹⁶¹ and within three days if the investigation showed that there was no error.¹⁶²

A financial institution which fails to comply with any of the requirements for error resolution will be responsible for the civil penalties provided in the section on civil liability.¹⁶³ In addition, the

¹⁵⁴*Id.* § 1693f(a).

¹⁵⁵*Id.* § 1693f(c).

¹⁵⁶*Id.*

¹⁵⁷*Id.* § 1693f(b).

¹⁵⁸*Id.* § 1693f(d).

¹⁵⁹*Id.*

¹⁶⁰*Id.* § 1693f(c).

¹⁶¹*Id.* § 1693f(b).

¹⁶²*Id.* § 1693f(d).

¹⁶³*Id.* § 1693m.

financial institution may be liable for treble actual damages¹⁶⁴ if it "did not make a good faith investigation [or] did not have a reasonable basis for believing that the consumer's account was not in error"¹⁶⁵ The financial institution can avoid this treble damage liability by provisionally recrediting the customer's account within the required ten-day period.¹⁶⁶ The financial institution can also be held responsible for treble actual damages if it "knowingly and willfully concluded that the consumer's account was not in error when such conclusion could not reasonably have been drawn from the evidence available to the financial institution at the time of its investigation"¹⁶⁷

g. Private remedies.—The EFT provisions on civil liability, section 915,¹⁶⁸ borrow heavily from those found in section 130 (Truth in Lending and Leasing) of the CCPA.¹⁶⁹ EFT provides that in an individual action by a consumer, a financial institution which fails to comply with any requirement with respect to the consumer is liable to him for actual damages, a civil penalty not less than \$100 nor greater than \$1,000, and costs of the action together with a reasonable attorney's fee as determined by the court.¹⁷⁰ In a class action the plaintiffs may recover actual damages plus a civil penalty, except that as to each member there is no minimum civil penalty and the total civil penalty is limited to the lesser of \$500,000 or one percent of the net worth of the defendant.¹⁷¹

EFT borrowed guidelines for fixing the appropriate civil penalty from the Fair Debt Collection Practices Act.¹⁷² In an individual action, the guidelines refer to "the frequency and persistence of noncompliance, the nature of such noncompliance, and the extent to which the noncompliance was intentional"¹⁷³ In a class action, the court considers not only the factors quoted above, but in addition "the resources of the defendant [and] the number of persons adversely affected"¹⁷⁴

The EFT provisions on excuse for violations borrow several ideas from other recent federal consumer credit laws. First, financial institutions are excused from liability for unintentional violations

¹⁶⁴*Id.* § 1693f(e).

¹⁶⁵*Id.* § 1693f(e)(1).

¹⁶⁶*Id.*

¹⁶⁷*Id.* § 1693f(e)(2).

¹⁶⁸*Id.* § 1693m.

¹⁶⁹15 U.S.C. § 1640 (1976).

¹⁷⁰15 U.S.C.A. § 1693m(a) (West Supp. 1979).

¹⁷¹*Id.*

¹⁷²15 U.S.C. § 1692 (Supp. I 1977).

¹⁷³15 U.S.C.A. § 1693m(b)(1) (West Supp. 1979).

¹⁷⁴*Id.* § 1693m(b)(2).

resulting from “bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.”¹⁷⁵ Second, there is excuse if the violation resulted from: (1) reliance by the financial institution on a Board rule or on an interpretation or approval issued by an authorized official of the Federal Reserve System, or (2) reliance by the financial institution on model forms or clauses issued by the Board.¹⁷⁶ Finally, the financial institution is released from liability for failure to comply with any requirement of EFT if it discovers the failure to comply, notifies the consumer of the failure before a law suit is instituted under EFT, and makes an appropriate adjustment to the consumer’s account, including payment of any actual damages.¹⁷⁷ This last provision is a variation of the principle found in section 130 of the CCPA.¹⁷⁸ Under that section, in order to be excused from liability the creditor must act within fifteen days after discovery of an error and prior to receipt of written notice of the error as well as prior to commencement of a law suit. EFT simply requires the financial institution to act before a law suit is filed.¹⁷⁹ It does not seem to matter that the consumer may have first notified the financial institution of the error. As to the adjustment, under EFT the financial institution must pay actual damages in order to avoid the civil penalty,¹⁸⁰ whereas under Truth in Lending the creditor must adjust the terms of the credit in the customer’s favor to coincide with any disclosure error.¹⁸¹

Finally, in enacting provisions on costs and attorney’s fees, Congress borrowed from the Fair Debt Collection Practices Act.¹⁸² EFT section 915F¹⁸³ provides that if the court finds “that an unsuccessful action . . . was brought in bad faith or for purposes of harrassment, [it] shall award to the defendant attorney’s fees reasonable in relation to the work expended and costs.”¹⁸⁴

¹⁷⁵*Id.* § 1693m(c).

¹⁷⁶*Id.* § 1693m(d).

¹⁷⁷*Id.* § 1693m(e).

¹⁷⁸15 U.S.C. § 1640(b) (1970).

¹⁷⁹15 U.S.C.A. § 1693m(e) (West Supp. 1979).

¹⁸⁰*Id.*

¹⁸¹15 U.S.C. § 1640(b) (1976).

¹⁸²15 U.S.C. § 1692 (Supp. I 1977).

¹⁸³15 U.S.C.A. § 1693m(f) (West Supp. 1979).

¹⁸⁴*Id.*