land had been encumbered by a restrictive covenant which forbade its sale to such minorities. The Supreme Court stated that, so long as the agreements were voluntarily enforced, there was no "state action" and, therefore, no constitutional infringment,[111] but concluded that the judicial enforcement of these restrictive agreements was a violation of the fourteenth amendment.[112]

In light of *Shelley*, the majority's statement will not withstand constitutional scrutiny. The use of restrictive covenants to exclude churches from residential areas is clearly analogous to the method attempted in *Shelley*. In both situations the court is requested to enforce agreements which, except for the absence of state action, are violative of constitutional protections. Thus, the judicial enforcement of restrictive covenants totally excluding churches from residential areas is an infringement of the right to religious freedom.

ALAN RAPHAEL*

V. Contracts, Commercial Law and Consumer Law

*Harold Greenberg***

A. Contracts; Covenants Not To Compete.

The validity of an employment agreement containing a covenant not to compete was sustained by the court of appeals in *Advanced Copy Products, Inc. v. Cool.*[1] Late in 1971, six months after the employee had begun work as a copying machine sales and service representative, the employer and employee executed a written agreement which contained a covenant not to compete with the employer for one year, the employment being terminable at will by either party. In 1973, the parties executed a new agreement which contained the same terms except: (1) The covenant not to compete

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[111] *Id.* at 13.

[112] *Id.* at 20. The court stated: "It is clear but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint." *Id.* at 19. Thus, those who seek judicial enforcement of racially restrictive covenants will be imbued with state action so as to bring the covenants within the scrutiny of the fourteenth amendment.

*The author wishes to extend appreciation to Gary Harter for his assistance in the preparation of this discussion.

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[1] 363 N.E.2d 1070 (Ind. Ct. App. 1977).

was extended to five years and limited to eleven Indiana counties, and (2) either party could terminte upon thirty-days notice. The employee subsequently left the employer for a job with a competitor, and the employer brought suit to enforce the covenant.

The trial court granted summary judgment in favor of the employee on the ground that the covenant was not supported by adequate consideration. More specifically, the court found the employee's continued employment was not dependent on his signing of the new agreement. Consequently, the continued employment did not constitute consideration. With this particular finding, the court of appeals agreed.[2] However, the appellate court did not agree with the trial court that the additional thirty-day notice provision was also inadequate as consideration. Rather, the appellate court found the added provision did constitute consideration sufficient to support the covenant. Accordingly, the court reversed and remanded the matter for further proceedings.[3]

The court of appeals also found sufficient consideration to support a covenant not to compete in *4408, Inc. v. Losure*,[4] in which the principal issue was the reasonableness of the covenant. The employee had worked as a coffee service salesman from 1967 to 1974 when he resigned rather than sign a covenant not to compete. The employee returned in 1975 and signed a new employment agreement in which he agreed not to compete in the coffee service business for a period of three years " 'only in the areas of his past, present and future employment with [the employer].' "[5]

As the court itself expressed:

> The concept of "reasonableness" has assumed increased importance in cases involving covenants not to compete. . . . In determining whether or not a covenant not to compete is reasonable, the court considers, in the circumstances of each case, the legitimate interests of the employer which might be protected by the covenant and the protection granted by the covenant in terms of time, space, and the types of activity proscribed.[6]

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[2]*Id.* at 1071. Because of this finding, the court of appeals was able to avoid the question whether continued employment of the employee constituted sufficient consideration for a covenant not to compete when the terms of the employment remain unchanged. The court stated that the law on this point "is unclear." *Id.* In some states, *e.g.*, Pennsylvania, it is quite clear that continued employment (coupled with a threat of termination) is not sufficient consideration to sustain such a covenant. *See, e.g.*, John G. Bryant Co. v. Sling Testing & Repair, Inc., 471 Pa. 1, 10-11, 369 A.2d 1164, 1168-69 (1977), and cases cited therein.

[3]363 N.E.2d at 1072.

[4]373 N.E.2d 899 (Ind. Ct. App. 1978).

[5]*Id.* at 900.

[6]*Id.*

Although an employer is not entitled to protection from the employee's use of his own knowledge, skill, or information (other than trade secrets and confidential information), the employer is entitled to protect the good will of its business. The protection is allowed when good will is created by the contact and personal relationship of the employee with the employer's customers, and is particularly enforced as to businesses in which the competition is intense and there is little practical difference between competitors.

The contract in *Losure* was drafted so as to limit the employee's competitive activities only in those areas where the employee had worked and had established customer contacts. Thus, this covenant was dissimilar to those covenants found to be unreasonable because they contained no geographical limits or attempted to impose limits beyond the area in which the employee worked.[7] Further, the three-year duration was found to be reasonable under the circumstances.

The obvious lesson from these cases is that if the employer carefully limits the scope and duration of the restriction and requires the covenant as part of a new agreement, the covenant will be enforced by the courts. The terms of the new agreement should differ in some material way from the existing terms of employment. An overreaching employer, however, may be held to have no restriction whatsoever.

B. Commercial Law

1. Breach of Warrant by a Financing Seller.—Thompson Farms, Inc. v. Corno Feed Products,[8] dealt with several significant issues under article 2 of the Uniform Commercial Code (U.C.C.):[9] (1) Whether a secured financing agency could also be a seller, (2) whether the on-site construction and sale of hog houses constituted a sale of goods, (3) whether the buyer was required to plead notice of alleged defects, and (4) whether the transaction involved express warranties or implied warranties of merchantability and of fitness for a particular purpose which might have been breached.

As a promotional device to increase sales of its livestock feed products, Corno developed a hog-marketing plan which included financing for the producer and blueprints for a specially designed, time and labor saving hog house.[10] Corno made no profit from the

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[7]*See* Donahue v. Permacel Tape Corp., 234 Ind. 398, 127 N.E.2d 235 (1955); Struever v. Monitor Coach Co., 156 Ind. App. 6, 294 N.E.2d 654 (1973).

[8]366 N.E.2d 3 (Ind. Ct. App. 1977). For a discussion of the agency aspects of this case, see *Corporations, 1978 Survey of Recent Developments in Indiana Law,* 12 IND. L. REV. 94, 94 n.1 (1978).

[9]U.C.C. §§ 2-101 to 725. All sections hereafter cited to the U.C.C. are also found in IND. CODE, title 26 (1976 & Supp. 1978).

[10]The houses, called "Corno Low Cost Pork Finishing Units," had slatted floors and walls, and were to be built over a lagoon. It was estimated by Corno that by keep-

sale of the hog houses themselves, but, apparently, earned its profits from the sale of feed required to be purchased by any producer who financed with Corno a purchase of the hog houses. A local distributor was appointed to furnish the hog houses according to Corno's plan and blueprints.

Corno's field representative presented a sales brochure, the marketing plan, and the blueprints to Thompson Farms, which agreed to enter the hog production business and to buy two hog houses with Corno financing. The local distributor hired the crew and purchased the materials for construction, but Corno's own employees periodically inspected the construction, solved problems, gave instructions to proceed, approved changes, and ultimately approved the final specifications upon completion. Corno and Thompson Farms then entered "Installment Sale and Security Agreements" which gave Corno security interests in the hog houses. Corno's checks were drawn to the distributor and Thompson Farms.[11]

The hog houses proved to be cold, wet, and drafty. Despite attempted modifications, approximately twenty-five percent of the 2,000 young pigs placed in the houses died of pneumonia and dysentery. Labor on the units consumed far more man-hours per day than the one-hour per day represented by Corno in its original sales presentation.

When Thompson Farms refused to make any further payments to Corno, Corno sued for the amount due. Thompson Farms counterclaimed, *inter alia*, for breaches of express warranties and of the implied warranties of merchantability and of fitness for a particular purpose.[12] The trial court, however, ruled adversely to Thompson Farms on all its affirmative defenses and counterclaims.

a. The Secured Financing Agency as Seller.—In an effort to avoid liability as a seller, Corno contended that it was only a financing agency, not the seller of the hog houses, and that Thompson Farms could look only to the distributor for relief.[13] The appellate

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ing a large number of hogs in a small place, only about an hour a day would be needed to feed and check them. 366 N.E.2d at 7.

[11]Like Corno, the distributor made no profit from the sale of the hog houses. The price charged to Thompson Farms equalled the cost of materials and labor without any profit. *Id.* at 11.

[12]*Id.* at 5. Thompson Farms also included claims based on negligence and strict liability in tort. These claims are not discussed by the court in its majority holding.

[13]*See In re* Sherwood Diversified Indus., Inc., 382 F. Supp. 1359 (S.D.N.Y. 1974); Atlas Indus., Inc. v. National Cash Register Co., 216 Kan. 213, 531 P.2d 41 (1975), *cited in* Thompson Farms, Inc. v. Corno Feed Prods., 366 N.E.2d at 13. In *Sherwood Diversified Industries* and *Atlas Industries*, an equipment lessee selected equipment which was shipped directly to his place of business by the manufacturer but was paid for by the lessor who took a security interest in the equipment and collected monthly

court determined: "[A] finding that Corno acted as a financing agency does not preclude a finding that Corno is also a seller."[14] The facts showed that Corno's own sales representative directly solicited Thompson Farms and that he or his department was directly involved in the construction. This situation led the court to conclude that Corno's sales department was responsible for the sale. Moreover, the court found, as a matter of law, that the distributor was Corno's agent, thereby making Corno responsible as a principal and as seller of the hog houses.[15] Thus, the transaction was both a secured transaction and a sale, and Corno was liable as a seller.

b. "Goods" under Article 2.—Having concluded that the transaction was a sale, and since, in its judgment, the warranty provisions of article 2 of the U.C.C. apply only to sales of goods,[16] the court was next required to determine if the hog houses consituted goods, *i.e.*, were they movable at the time of identification to the contract.[17] In the loan agreement, the parties had referred to the hog houses as "equipment" (along with feeders, bins, and waterers), which was not to be abused or misused and could be repossessed, and Thompson Farms had paid a single price for each hog house. Furthermore, the court observed that Indiana courts had already considered a mobile home, electricity, and a car washing center to be goods,[18] as had the Court of Appeals for the Seventh Circuit with

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payments from the lessee. The lessor had nothing to do with the selection and merely paid the manufacturer, took title, and entered a lease with the lessee. In both cases, the transactions were considered sales by the manufacturer directly to the lessee, with the lessor occupying the position of financing agency rather than that of seller. *See* U.C.C. § 2-104(2).

[14]366 N.E.2d at 13 (footnote omitted).

[15]*Id.* at 12-13.

[16]366 N.E.2d at 14-15. The court did note several cases from other jurisdictions which have applied the U.C.C. to transactions analogous to a sale, but it did not reach this issue because of the finding that a sale did, in fact, take place in this case. *See id.* at 14 n.9. The concurring and dissenting opinion disagreed with the court's determination that there was a sale of goods within the coverage of the U.C.C. *Id.* at 19-20 (Garrard, J., dissenting in part).

[17]U.C.C. § 2-105(1) states:

> "Goods" means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities . . . and things in action. "Goods" also include the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty (Section 2-107).

U.C.C. § 2-107(1) essentially provides that a contract for sale of a structure to be removed from realty by the seller is a contract for the sale of goods. A finding that the hog houses were "goods," therefore, was not inconsistent with the Code.

[18]Jones v. Abriani, 350 N.E.2d 635 (Ind. Ct. App. 1976) (mobile home); Helvey v. Wabash County REMC, 151 Ind. App. 176, 278 N.E.2d 608 (1972) (electricity); Abbett v. Thompson, 148 Ind. App. 25, 263 N.E.2d 733 (1970) (car washing equipment). The

regard to a one-million-gallon water tank to be assembled in place.[19] The hog houses, therefore, were held to be goods.[20]

c. Notice of Defect.—Section 2-607(3)(a) of the U.C.C. requires: "[T]he buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy . . . ."[21] Consistent with decisions in other jurisdictions[22] and with the Official Comment to section 2-607, the court held that the required notice is a substantive condition precedent so that the party claiming breach of warranty must allege that notice of defect was given.[23] Thompson Farms had satisfied this requirement.[24] The court declared that Corno's general denial was not sufficient to put the question of notice in issue under Trial Rule 9(C) which requires a specific denial of a properly pleaded condition precedent.[25]

d. Express and Implied Warranties.—The court reiterated the rule that implied warranties are not *made*; they are implied by law for the protection of the buyer and must be liberally construed.[26] The court specifically found that an implied warranty of fitness for a particular purpose under U.C.C. section 2-315 did exist because Corno knew the particular purpose for which Thompson Farms intended to use the hog houses and, in fact, had told Thompson Farms how to use them.[27] Whether this implied warranty had been breached and the damages arising therefrom were facts to be determined by the trial court on remand.[28]

Abbett court was not required to rule on the "goods" issue because the parties agreed the U.C.C. governed the transaction and that the only real issue was revocation of acceptance. The written agreement between Corno and Thompson Farms, describing the hog houses as equipment which could be repossessed, may have been the factor which weighed most heavily.

[19]Pittsburgh-Des Moines Steel Co. v. Brookhaven Manor Water Co., 532 F.2d 572 (7th Cir. 1976) (applying Illinois law).

[20]366 N.E.2d at 16.

[21]U.C.C. § 2-607(3)(a).

[22]Page v. Camper City & Mobile Home Sales, 292 Ala. 562, 297 So. 2d 810 (1974); L.A. Green Seed Co. v. Williams, 246 Ark. 463, 438 S.W.2d 717 (1969); Winter v. Honeggers' & Co., 215 N.E.2d 316 (Iowa 1974); Annot., 53 A.L.R.2d 270 (Supp. 1976), *cited in* Thompson Farms, Inc. v. Corno Feed Prods., 366 N.E.2d at 16.

[23]366 N.E.2d at 17.

[24]In its counterclaim, Thompson Farms had alleged, " 'That the plaintiff was duly notified of the defects in said hog houses and of the breach of express warranty and implied warranties, but Plaintiff has failed to make the said hog houses conform to said warranties." *Id.*

[25]*Id.*

[26]*Id.* at 18 (citing Woodruff v. Clark County Farm Bureau Coop., 153 Ind. App. 31, 42, 286 N.E.2d 188, 194 (1972)).

[27]*Id.* at 18-19.

[28]On the issue of express warranty, the court was unable to determine from the record whether the trial court had found that no express warranty existed because it

2. Warranty of Title.—In *McDonald's Chevrolet, Inc. v. Johnson,*[29] the court found that the defendant-seller had void, rather than voidable, title to a motor home and that, therefore, the seller had violated the warranty of title mandated by section 2-312(1)(a).[30] Murphy rented the motor home from its owner in Texas for thirteen days, immediately left the state, obtained titles to the motor home in Alabama and Nebraska, and ultimately used it as a trade-in on a truck purchased from McDonald's in Indiana. Johnson purchased the motor home from McDonald's, only to have it seized by the police thirteen months later.

McDonald's contended that it was a good faith purchaser from Murphy who possessed voidable title under section 2-403 of the U.C.C.[31] and that it thereby acquired good title which it transferred to Johnson. After an analysis of the term "voidable title," which is not defined in the U.C.C., the court held that Murphy's title was void and that the warranty of title had been breached.[32]

An alternative the court could have followed, and which would have avoided the need to distinguish between void and voidable title, would have been to find that the warranty of title includes a warranty of quiet possession, which the Indiana and Official Comments to section 2-312 state it does, and that Johnson's quiet possession was interrupted.[33]

3. Assignments.—In *First National Bank v. Schrader,*[34] the

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had earlier found that there had been no sale or merely that there had been no express warranty. Similarly, the trial court had not determined whether Corno was a "merchant," which is one of the requirements for the existence of an implied warranty of merchantability. U.C.C. § 2-314. Both issues would be determined on remand.

Judge Garrard, who refused to characterize the transaction as a sale of goods, would have found that no warranties under the U.C.C. applied, but would have remanded for a finding as to the existence of express warranties under general contract principles. 366 N.E.2d at 20-21 (Garrard, J., concurring in part).

[29]376 N.E.2d 106 (Ind. Ct. App. 1978).

[30]*Id.* at 109.

[31]U.C.C. § 2-403 states:

> (1) A purchaser of goods acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased. A person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though
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> (a) the transferor was deceived as to the identity of the purchaser; or
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> . . . .
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> (d) the delivery was procured through fraud punishable as larcenous under the criminal law.

[32]*Id.* at 108-09.

[33]*See* J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 9-11 (1972).

[34]375 N.E.2d 1124 (Ind. Ct. App. 1978).

court was asked to hold that the assignment of a retail installment contract for the purchase of a used car was governed by the formal requirements of articles 3 and 9 of the U.C.C. Not so, replied the court.[35] Article 3[36] is restricted to negotiable instruments, *i.e.*, drafts, checks, notes, and certificates of deposit, and article 9[37] covers secured transactions. This transaction involved neither a negotiable instrument nor a secured creditor. It was a simple transaction in goods under article 2, section 210, which provides for assignment of contracts unless otherwise agreed. In the absence of such agreement, there are no formalities required to validate the assignment.

4. Accomodation Parties; Tender of Payment.—In *Stockwell v. Bloomfield State Bank*,[38] a borrower's application for a loan was denied for lack of security, but was subsequently approved when the Stockwells also agreed to sign the note.[39] When the note came due, a second note was prepared and "co-signed by" the Stockwells. That note was succeeded by a third note on which the bank ultimately brought suit for principal, interest, and attorneys' fees. The Stockwells tendered principal and interest but refused to pay the fees. As defenses, they alleged failure of consideration, impairment of collateral, and tender of payment which terminated their liability.

The court first found that the Stockwells were accomodation parties under section 3-415 of the U.C.C.[40] They had lent their names so that the borrower could obtain the loan, and they received only indirect benefit from the funds which were paid directly to the borrower. Further, Stockwell wrote "co-signed by" before signing the second note. While no single factor controlled, the entire transaction showed clearly that the Stockwells were accomodation parties.[41]

The finding that the Stockwells were accomodation parties rather than co-makers had a direct effect on the defenses available to them. In particular, failure of consideration was not available since no separate consideration need run to an accomodation party. The accomodation party's consideration is the primary obligor's receipt of the proceeds of the loan.

The court found it unnecessary to determine if the tender without attorneys' fees was sufficient to discharge the Stockwells

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[35] *Id.* at 1125.

[36] U.C.C. §§ 3-101 to 121.

[37] *Id.* §§ 9-101 to 507.

[38] 367 N.E.2d 42 (Ind. Ct. App. 1977).

[39] The Stockwells had leased a building to the borrower for the operation of a business.

[40] U.C.C. § 3-415 provides, in pertinent part: "(1) An accommodation party is one who signs the instrument in any capacity for the purpose of lending his name to another party to it."

[41] 367 N.E.2d at 45.

under section 3-604, since a proper tender must be kept open if refused. The failure of the Stockwells to pay the amount tendered into court rendered the defense ineffective.[42]

5. *Bills of Lading: Claims and Damages.*—In *Midwest Emery Freight System, Inc. v. IMC, Inc.*,[43] a consignor's goods, shipped on January 20, 1972, were rejected by the consignee shortly after delivery on January 21, 1972, and were returned to the carrier for redelivery to the consignor. The shipment was left by the carrier at a truckstop, and the redelivery to the consignor was not attempted until approximately eighteen months later, in August 1973. The consignor had filed a claim for the lost goods in November 1972, and refused the August 1973 delivery because the goods had deteriorated to less than scrap value. The consignor's claim for damages was filed in November 1973.

The original bill of lading provided that claims for loss, damage, or delay would be precluded unless filed with the carrier, in writing, within nine months after delivery. The appellate court rejected the carrier's argument that the first claim had been filed more than nine months after the January 1972 delivery. The trial court had ruled that, when the goods were rejected by the consignee and returned to the carrier for redelivery, a new contract of carriage had been created under which no delivery had been attempted until August 1973. The finding of a new contract was not challenged by the carrier and was, therefore, binding upon it, thereby making the 1972 delivery irrelevant to the case.

On the issue of damages, the appellate court agreed that the consignor was entitled to lost profits because the returned goods had been totally damaged as a result of the carrier's conduct. However, because the goods, as originally shipped, were already defective, the consignor was entitled to receive the price of the goods under its contract with the consignee less the amount it would have cost to remedy the original defects and to perform the contract properly.[44] This difference is what the consignor would ultimately have received as profit and was the proper measure of damages.

6. *Accord and Satisfaction.*—An injured motorcyclist in *Tabani v. Hester*,[45] refused to accept a draft marked "All Claims" from the tortfeasor's insurance company even though it was accompanied by a letter which stated that the draft was without obligation. The insurance company then tendered a draft without the offending

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[42]*Id.* at 46.
[43]363 N.E.2d 1078 (Ind. Ct. App. 1977).
[44]*Id.* at 1080.
[45]366 N.E.2d 193 (Ind. Ct. App. 1977).

language together with a letter which stated that the amount was the largest the company would pay and that it was "a fair and equitable conclusion" of the claim.[46] The cyclist cashed the check and brought suit for the balance of his claim. The trial court held that this conduct constituted an accord and satisfaction and granted the tortfeasor's motion for summary judgment. The court of appeals reversed.[47]

Accord and satisfaction is ordinarily a question of fact and becomes a question of law, determinable upon motion for summary judgment, only if the controlling facts are undisputed. "When the debt is unliquidated, the money paid to operate as a full discharge must be offered with either an express condition that acceptance is in full satisfaction of the pending claim or the circumstances must clearly indicate *to the creditor* that this condition is present."[48] Moreover, without the condition appearing on the draft, accord and satisfaction may be implied only on a showing of the subjective intent of the parties.[49] The cyclist's affidavit stated that he understood he would be able to seek additional recovery. This clearly raised an issue of fact which could not be disposed of by motion for summary judgment.

C. Consumer Law; Truth in Lending

The issue confronting the court in *Mirabal v. General Motors Acceptance Corp.*[50] was the proper amount of attorneys' fees to be allowed, after an earlier court of appeals decision in the same case[51] which involved interpretation and application of the Federal Consumer Credit Protection Act (CCPA)[52] and of Regulation Z of the Federal Reserve Board.[53] The earlier decision was the subject of discussion in the 1977 Survey.[54]

The retail installment sales contract signed by the Mirabals included an inaccurate disclosure of the annual percentage rate, because the figure, apparently, had been taken from the wrong line of the table or chart by the employee who completed the disclosure form. About a week later, GMAC sent a letter explaining the error and setting forth the correct rate, although the amount of the

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[46]*Id.* at 194.

[47]*Id.* at 195.

[48]*Id.* at 194 (emphasis added) (citations omitted).

[49]*Id.* at 195.

[50]576 F.2d 729 (7th Cir. 1978) (per curiam).

[51]537 F.2d 871 (7th Cir. 1976).

[52]15 U.S.C. §§ 1601-1691f (1976).

[53]12 C.F.R. § 226.2(f) (1977).

[54]Bepko, *Contracts, Commercial Law, and Consumer Law, 1977 Survey of Recent Developments in Indiana Law,* 11 IND. L. REV. 100, 119-22 (1977).

payments remained unchanged.[55] The Mirabals filed suit for violation of the CCPA and recovered a judgment of approximately $8,000 based on seven specific violations of the Act. The Court of Appeals for the Seventh Circuit sustained the findings of violation but reduced the judgment to $2,000 because, according to the court, the CCPA permitted a maximum recovery of $1,000 per litigant regardless of the number of disclosure violations in a single disclosure statement. The court remanded the case for entry of judgment in the amount of $2,000 plus costs and attorneys' fees which were allowable by statute.

On remand, the Mirabals' attorney alleged that he had expended 350 hours on the case: 120 at trial and 230 on the first appeal, and that GMAC's attorneys had been paid $30,000 for handling the case. These facts were not disputed. The district court allowed attorneys' fees of $2,000, from which the Mirabals appealed. The court of appeals affirmed.[56]

The analysis of the court of appeals deserves particular attention.

> Although the determination of hours necessary to effectively handle a case is not subject to exact determination, the amount which petitioner claims to have spent on the present case seems clearly out of proportion with the *amount in controversy*. Moreover, Congress has limited the liability of Truth in Lending Act violators to $1,000 per violation. 15 U.S.C. § 1640(a). To grant attorney's fees greatly in excess of a client's recovery *requires strong support from the circumstances* of the particular case. The instant case involved a one-time individual claim based mainly on a *bona fide arithmetical error*. . . .
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> Additionally, to grant large attorney's fee awards on the basis of relatively small injury would encourage suits which do not further the client's interest or the public's interest.[57]

The court appears to have said that it will not sanction mammoth fees in suits based on inadvertent, one-time, technical violations accompanied by little or no harm to the borrower or to the public. The court's reference to the "amount in controversy," however, causes some concern. Consumer transactions involving more than one disclosure statement are the exception rather than the rule. With the $1,000 per disclosure statement per plaintiff limitation in effect, to have the amount in controversy serve as any

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[55]The Mirabals denied receiving the letter. 576 F.2d at 730.
[56]*Id.* at 731.
[57]*Id.* at 730-31 (emphasis added).

basis for determining attorneys' fees would certainly have a chilling effect on private actions to redress violations of the CCPA. This is particularly true if the lender is resisting strenuously, as the dissent thought GMAC to be doing,[58] and the consumer's counsel can envision long hours and work fighting a corporate giant. Instead, the emphasis should be placed on the other elements noted by the court—the circumstances of the case and the nature of the violation and injury to consumer and public, without relation to the amount in controversy.[59]

The court also rejected the contention that the amount of attorneys' fees paid by GMAC was indicative of what the borrowers' attorney should be paid and stated again the rule that it is an abuse of discretion to determine attorneys' fees solely on the basis of hours spent times billing rate.[60]

During this survey period, a case involving truth in lending litigation under the CCPA reached the Indiana Supreme Court. In *Holmes v. Rushville Production Credit Association*,[61] the court denied transfer, leaving the decision of the court of appeals[62] in full force and effect. The dissent from the denial of transfer,[63] however, raises some important questions pertaining to the facts of the case.

The credit association had brought an action to recover the balances due on two notes. The borrowers raised various defenses, including violations of the disclosure requirements of the CCPA and Indiana's Uniform Consumer Credit Code.[64] The court of appeals initially affirmed the trial court's decision in favor of the lender.[65] On rehearing, the court of appeals vacated its earlier opinion and

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[58]*See id.* at 733-34.

[59]The dissenting opinion expressed the belief that strong support from the circumstances of the case to support an award of higher fees did exist, particularly since the trial court had found numerous violations of the CCPA, and the borrowers were brought into the appellate court by GMAC's appeal. *Id.* at 733-34 (Swygert, J., dissenting). However, it was the trial court which had declared that expenditure of 350 hours on this case was " 'utterly unnecessary' " and awarded $2,000 based on its evaluation of the case and of the work of the borrowers' attorney. The dissenting opinion faulted the trial judge for not detailing specifically the reason counsel's expenditure of so much time was utterly unnecessary. *Id.* at 732-33 (Swygert, J., dissenting).

[60]*Id.* at 731.

[61]371 N.E.2d 379 (Ind. 1978) (per curiam).

[62]Holmes v. Rushville Prod. Credit Ass'n, 353 N.E.2d 509 (Ind. Ct. App.), *opinion temporarily withdrawn and case remanded*, 355 N.E.2d 417 (Ind. Ct. App.), *supplemental opinion*, 357 N.E.2d 734 (Ind. Ct. App. 1976), *transfer denied*, 371 N.E.2d 379 (Ind. 1978) (per curiam).

[63]371 N.E.2d at 379-81 (Hunter, J., dissenting).

[64]IND. CODE §§ 24-4.5-1-101 to 6-203 (1976 & Supp. 1978).

[65]353 N.E.2d 509 (Ind. Ct. App.), *opinion temporarily withdrawn and case remanded*, 355 N.E.2d 417 (Ind. Ct. App.), *supplemental opinion*, 357 N.E.2d 734 (Ind. Ct. App. 1976), *transfer denied*, 371 N.E.2d 379 (Ind. 1978) (per curiam).

remanded the case for consideration of the disclosure violation defenses with which the trial court initially had failed to deal.[66] After reconsideration at the trial level, and a second appeal by the borrowers, the court of appeals affirmed the trial court's findings as to the alleged disclosure violations and reinstated its prior opinion, as modified.[67] It was the borrowers' petition to transfer this last decision which was denied by the supreme court.[68]

From the facts as they appear in Justice Hunter's dissenting opinion, there were several violations of the CCPA, yet the court of appeals affirmed on the basis of the trial court's finding of *substantial compliance.* Moreover, the court of appeals upheld the findings of proper disclosure by " '[a]ccording due regard to the trial court's opportunity to assess the witnesses' credibility . . . .' "[69] This result seems directly at odds with the CCPA's requirement of strict compliance with its terms.[70] The dissenting justice expressly recognized the issue, would have reversed the court of appeals, and would have awarded damages under the CCPA.[71] It would be useless to speculate why the court denied transfer. If the court felt that the result would have been the same, perhaps it should have granted transfer and affirmed in a brief opinion which would reinforce, rather than cast some doubt on, the required strict compliance with the CCPA as applied in Indiana.

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[66]355 N.E.2d 417 (Ind. Ct. App.), *supplemental opinion*, 357 N.E.2d 734 (Ind. Ct. App. 1976), *transfer denied*, 371 N.E.2d 379 (Ind. 1978) (per curiam).

[67]357 N.E.2d 734 (Ind. Ct. App. 1976), *transfer denied*, 371 N.E.2d 379 (Ind. 1978) (per curiam).

[68]371 N.E.2d 379 (Ind. 1978) (per curiam).

[69]*Id.* at 381 (Hunter, J., dissenting) (quoting 357 N.E.2d at 734).

[70]Three defenses are available to lenders for failure to make proper disclosures: (1) Correction of error and appropriate adjustments (15 U.S.C. § 1640(b)), (2) proof that "the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error" (15 U.S.C. § 1640(c)), and (3) demonstration of action in conformity with then existing rules, regulations, and interpretations of the Federal Reserve Board (15 U.S.C. § 1640(f)). *See* D. ROTHSCHILD & D. CARROLL, CONSUMER PROTECTION § 12.01, at 331-32 (2d ed. 1977). None of these defenses applied in *Holmes*. (1) and (3) clearly did not, and (2) "was provided to avoid imposing 'strict liability' for unavoidable clerical errors upon creditors." Mirabal v. General Motors Acceptance Corp., 537 F.2d at 879 (citing Haynes v. Logan Furniture Mart, Inc., 503 F.2d 1161, 1167 (7th Cir. 1974)).

[71]371 N.E.2d at 381 (Hunter, J., dissenting).