IS BANKRUPTCY REALLY NECESSARY? POTENTIAL CAUSES OF ACTION LOST UPON FILING

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I. INTRODUCTION

When a client elects bankruptcy, it's his trustee who accedes to whatever "action" there may be in the estate under section 70 of the Bankruptcy Act.[1] In the old Abbott & Costello baseball routine, Costello asked Abbott, "Who's on first?" Abbott responded, "What's on first, Who's on second." It's just such a routine the bankrupt and trustee go through at the first meeting of creditors—they have to have a definition of terms and a meeting of the minds before the trustee can understand just "what" belongs to "who(m)." Bankrupts can't "lay off" their "action" with another bookie. Going bankrupt is like taking a bath: you have to take all your clothes off rather than clinging to your shorts and socks for protection. If your client has a lawsuit of any appreciable value, you had better settle it before the filing of a bankruptcy petition, because a multitude of potential causes of action may be lost as soon as the petition is filed.

Section 70(a)(5) of the Bankruptcy Act cloaks the trustee with the mantel of all causes of action unless they are exempt under state law by virtue of the following language:

> property, including *rights of action*, which prior to the filing of the petition he could, by any means, have *transferred* or which might have been *levied upon and sold under judicial* process against him, or otherwise seized, impounded, or sequestered; provided that rights of action ex delicto for libel, slander, injuries to the person of the bankrupt or of a relative, whether or not resulting in death, seduction and criminal conversation, shall not vest in the trustee *unless* by the law of the state, *such rights of action are subject to attachment, execution, garnishment sequestration or other judicial process. . . .*[2]

Section 70(a)(6) of the Bankruptcy Act is unequivocal in the trustee owning: "rights of action arising upon *contracts* or usury, or the *unlawful taking* or *detention of* or *injury to his property*."[3]

Obviously there is no question that the trustee owns, *instanter* on the filing of the petition, all actions for contract and injury to property, *inter alia*. The only question remaining is, does he also own actions in tort under Iowa law so

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1. 11 U.S.C. § 110 (1970).
2. *Id.* § 110(a)(5) (emphasis added).
3. *Id.* § 110(a)(6) (emphasis added).

we'll know whether or not the right is too valuable to forfeit in a bankruptcy? Section 626.21 of the *Code of Iowa* (1975) allows a levy on "choses in action" and provides as follows: "Judgments, money, bank bills, and other things in action may be levied upon, sold or appropriated thereunder, and an assignment thereof by the officer shall have the same effect as if made by the defendant."

This section was most recently discussed by the Iowa supreme court in *Steffens v. American Standard Insurance Co.*,[4] wherein a guest passenger's judgment against his host was enforced by execution on the motorist's causes of action against his automobile liability insurer. The insured's causes of action were purchased at a sheriff's sale and the injured person was entitled to sue the insurers on those causes of action. *Brenton Brothers v. Dorr*[5] involved a case where the plaintiff had a pre-existing judgment against the defendant when he sued the defendant on another matter, which had accrued since the time of the first judgment. The defendant alleged a counterclaim, by way of answer to the plaintiff's second petition. Plaintiff levied on the counterclaim and used it to satisfy the initial judgment, pro tanto, based on the amount realized at the sheriff's sale. This effectively eliminated the counterclaim to the suit and allowed plaintiff to go on without any "smoke screen;" "other things in action" were held to include a claim for breach of contract.

II. Claim of Exemption

I have made claim for causes of action to be held as exempt in Iowa in bankruptcy proceedings, indicating that the actions were *ex delicto* and, resultantly, not subject to claims of creditors, hoping the trustee would not know the law as it applied to torts. In each case the trustees have approved the exemption claimed but perhaps this was due to the trustee feeling the claims were valueless or, alternatively, subject to counterclaim or set-off to a balance owed a creditor. The simplest way to administer the asset was to allow it as exempt, thereby abandoning the claim and revesting the bankrupt with title to the lawsuit, to sue whomever he chooses.

Anyone who has ever read through the Iowa Exemption Law[6] knows of its archaic provisions for "muskets, six stands of bees, a spinning wheel" and other items of comparable relevance. The exemptions under the homestead law[7] are limited to forty acres in the country and a half acre in the city.[8] It has always been my hope that some day I can do a little pre-bankruptcy planning with one of my clients and convert non-exempt assets to exempt pigs under six months of age.[9] My client then would have millions of the little devils at least ten deep on the forty-acre homestead when he filed his

4. 181 N.W.2d 174 (Iowa 1970).
5. 213 Iowa 725, 239 N.W. 808 (1931).
6. Iowa Code ch. 627 (1975).
7. *Id.* ch. 561.
8. *Id.* § 561.2.
9. *Id.* § 627.6(9).

bankruptcy petition, leaving the trustee with nothing to administer. But then we all have our dreams of the perfect bankruptcy petition, like surfers waiting for the ultimate ninth wave.

With the enactment of the Iowa Consumer Credit Code,[10] I wonder if we haven't created a hybrid kind of exempt property by the enumeration of certain items on which a security interest can't be taken: "clothing, one dining room table and set of chairs, one refrigerator, one heating stove, one cooking stove, one radio, beds and bedding, one couch, two living room chairs, cooking utensils and kitchenware."[11]

For several years I served on the Exemption Revision Committee of the Young Lawyers section of the Bar Association, which may still be functioning in much the same manner as we did. Regardless of our fine plans, the Legislature never adopted the proposed revisions except insofar as it applied to wages and a few other related matters to bring us in line with the Consumer Credit Protection Act[12] in regard to restrictions on garnishment. Proposals for gross exemptions of $2,500.00 or $5,000.00, with "you select the property" directions given to the debtor, seem more logical. Each of us has different preferences and broad exemptions allow individuality rather than being waist-deep in piglets under six months of age. This way you could claim a lawsuit exempt if its expected liquidated value was less than the exemption authorized; otherwise you could receive a portion of it. Cases are rather clear that when a gross allowance of, say, $2,500.00 is granted for personal property, to be selected by the debtor, he may choose cash, a bank account, a lawsuit, or whatever suits his fancy when faced with a confronting levy thereon by a judgment creditor.[13]

III. Financial Disaster . . . The Client Appears

The top may appear to have blown off the financial world of the beleaguered soul who confronts us over the desk with his tale of woe. Instead of symbolic catastrophe, however, it is all too real and we are to work a miracle, like Mandrake the Magician, and the debtor's problems are to vanish.

One of the few times a client is happy when he brings a problem to his attorney is when adoption is contemplated. All other contacts are fraught with an emotional overlay of crisis—breach of contract, personal injury, death of a loved one, domestic difficulties, criminal problems—the list is legion. Interwoven throughout the fabric of confronting problems is *financial disaster*. A myriad of creditors are assailing the portals of the debtor's home or business when he comes to you for what he hopes will be "the answer." Unfortunately, we are seldom able to wave Mandrake's wand and must salvage for the debtor some semblance of order out of the chaos he discusses.

10. *Id.* ch. 537.
11. *Id.* § 537.3301(3).
12. 15 U.S.C.A. § 1671 *et seq.* (1975).
13. 35 C.J.S. *Exemptions* §§ 26-30 (1960).

IV. Selection of Alternatives—Let the Punishment Fit the Crime

The most recent disaster film produced is "Tidal Wave," and perhaps it typifies the spate turned out in this genre. With the declining economy, bankruptcy courts are seeing a tremendous rise in petitions filed, just as we are in our own practices. Each client is faced with alternatives: "gutsing" it out, an informal composition, or more formal state or federal liquidation. It is thus important that we tailor the client's problems to the solution proposed.

Although I have never had a client kill himself because of his oppressive financial burden, the market crash of 1929 saw many men jumping from skyscrapers. Now the same problems are more typically handled by one-car accidents so that double indemnity can be collected on life insurance. I was involved in a case where a man quit his job because he was being harassed at work by calls from his creditors. He didn't tell his wife he had lost his job, left in the morning supposedly for work and hid in the bushes in the backyard until dark, when he would return home. It was reminiscent of the man in the cartoon in a packing crate in the fetal position with the caption, "People are no damn good!" These are the extreme cases—at the other pole is the debtor who is simply overextended but has a sufficient cash flow to meet the claims of his secured creditors and the unsecured creditors must be held in abeyance for a time by way of the aforementioned arrangement, formal or informal, either under the Bankruptcy Act or as a common law composition. Another solution would be to find additional financing from a more forward-looking lender who would see some light in the curl of that impending tidal wave and advance the debtor a sum sufficient to meet all current claims.

Unfortunately, by the time most clients in financial difficulty reach us they have run the gamut of emotional degradation and are apt subjects for emotional counseling with psychologists or psychiatrists. Because of the debasement of their self-image by repeated rejection from creditors and their inability to generate enough cash for the family, we must help them to eradicate this psychic tattoo.

Whatever route you select to follow towards the ultimate goal of client rehabilitation, you must give each of them a new vision of himself as a viable and important human being, not the Born Loser of the comics, and something short of Captain Marvel or Superman. The client must be advised on the making of and adherence to a comprehensive budget or he will be turning up in another lawyer's office every six years looking for sequential discharges in bankruptcy. My first bankruptcy client was one of these repeaters and he knew more about the law than I, just fresh out of law school and armed only with a course in Creditors' Rights.

V. Beleagured Debtor—A Bonanza to Lawyers

A veritable Pandora's Box of causes of action faces you across the desk when you interview your destitute client. He was the last hired and the first fired because he is marginal. He hasn't been able to go to a lawyer because he can't afford to pay for food and shelter, much less your fee. He, truly, has been beleaguered in the classic sense of the word.

Quoting from something I have said before,[14] in the final analysis we are talking of failures when we consider these people: certainly financial tragedies, and perhaps emotional and moral failures as well. These individuals are the true rejects of our frenetic, over-productive, over-consumptive society, who aspired to the Orwellian dream of being "more equal" but always fell short of the mark. They may function almost to the level of above-marginal effort, but large bills for family sickness or loss of employment return them to imminent crisis by garnishment of wages, which often precipitates their appearance in our offices. These clients must be treated with tact and compassion and assisted in finding the guidance they seek. Surely we, as members of the Bar, can aid them in the termination of sharp and harsh collection practices by bringing them under the protective umbrella of the federal court system, either as a wage earner under the provisions of Chapter XIII,[15] or as a straight bankrupt for individuals, and by way of other rehabilitation measures for businesses in trouble. Few creditors care to confront a bankruptcy judge as they are reasonably sure, for a change, they are overmatched.

VI. All We Want For the Client is All There Is—And Then Some!

As counsel for bankrupts we must make sure that we get all there is (and more) for our clients in determining what potential causes of action they may have before the filing of a bankruptcy petition. Look into Pandora's Box to see if there are assets more than sufficient to satisfy the creditors' claims if you care to assiduously follow them up. Less than complete attentiveness, however, will result in them being lost.

Lines v. Frederick[16] indicated that vacation pay was not an asset which passed to the trustee because it was necessary for the bankrupt to use as part of his "fresh start", to which he was entitled. Few other things receive such favorable treatment. Some of the choses in action you should look for, in my opinion, follow.

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14. Giles, *The Overlooked Debtor's Remedy—Wage Earner Proceedings Under Chapter XIII of the Bankruptcy Act*, 15 S.D.L. Rev. 273, 286 (1970).
15. 11 U.S.C. §§ 1001-86 (1970).
16. 400 U.S. 18 (1970).

A. Abuse of Process

This is a tort distinguished from malicious prosecution, which, in Iowa, must involve criminal charges subsequently dismissed, brought without probable cause or sequestration of civil property similarly taken, *inter alia*, for the action to be extant. *Bradshaw v. Frazier*[17] involved a writ of removal served when the tenant's child had measles after a judgment in a forcible entry and detainer action. Even more unbelieveable was that the child who died as a result of the eviction was the landlord's granddaughter. The sheriff who accompanied the plaintiff grandfather in the forcible entry and detainer action, who became defendant in the abuse of process case, waited for the child's father to come home but, at that time, set her out in the barnyard one cold, cloudy, windy and raw September day for an hour and a half before someone would take her in. The court stated, "it is virtually conceded there may be cases where damages may be recovered for an abuse in the service or execution of the writ."

In *Nix v. Goodhile*,[18] a judgment creditor levied on the wages of the debtor, even though he knew they were exempt, in order to attempt to coerce or extort money from the defendant in payment of the judgment. Obviously it wasn't improper to have an execution issued on the judgment, but the court felt it perverted the process involved and stated, "[w]e should be careful to observe a distinction between suing out of a writ and the *improper use of the writ after it is issued*. . . . Such a proceeding is a *use and abuse* of the processes of the court, and, when done with the motives indicated, it is actionable."[19]

The rationale in the *Nix* case can be used in support of a similar action in the event of garnishment of wages which the creditor knows are less than forty times the minimum wage, otherwise exempt in Iowa to consumers.[20] In essence, if the debt is one which arose out of a consumer credit transaction and the debtor earns $84.00 or less weekly, he can't be garnished without the repercussions noted above.[21]

B. Conversion

A fairly common example of conversion is the retaking of a debtor's automobile or other property without the forwarding of a notice of right to cure, without complying with commercial reasonableness, or by compulsory disposition of collateral.[22] Another example is a landlord's intrusion into his tenant's property to dispossess without legal process,[23] or, alternatively, to take a little

17. 113 Iowa 579, 85 N.W. 752 (1901).
18. 95 Iowa 282, 63 N.W. 701 (1895).
19. Nix v. Goodhile, 95 Iowa 282, 284, 286-87, 63 N.W. 701, 702 (1895) (emphasis added).
20. Iowa Code § 537.5105(2) (1975).
21. *Id.* § 537.5111. Sixty-three dollars weekly must be earned before garnishment is permissible for non-consumer credit obligations, subject to a maximum of $250.00 in a calendar year. 15 U.S.C. § 1671 *et seq.* (1970); Iowa Code § 642.21 (1975).
22. Iowa Code §§ 537.5103, 554.9504 (1975).
23. Annot., 6 A.L.R.3d 177 (1966).

something to make himself feel more "secure," without having bothered to take a judgment—a minor matter.

The case of *Carpenter v. Scott*[24] involved a jeweler's stock in trade taken for an alleged $153.00 balance due on two notes sued out in Justice of Peace Court, in excess of its jurisdiction. The constable and judgment creditor were held liable for damages for conversion because of the execution being void.

Hartman v. Peterson[25] involved the contract purchase of some real estate. The vendee got behind on payments and moved out, leasing his interest in the property, on which no forfeiture or foreclosure had begun, to Hartman, who was summarily dispossessed by the vendor, Peterson, who changed the locks on the property and gave the new tenant a great deal of verbal abuse. The court held this was constructive eviction.

I had a similar case[26] in 1967, which was settled without trial, where the landlord had taken a snooze alarm clock and, additionally, turned off the electricity and gas in February—not exactly a friendly act in the middle of winter. Needless to say, my clients moved, spending the night in the bus station, the only warm place they knew since they were without money and had a crippled child. Damages were claimed for the breaking and entering and theft of the alarm clock, return of the leased premises, violation of the minimum housing code insofar as the constructive eviction by turning off the electricity and gas, and defamation.

C. *Fraud and Deceit*

Typically these matters arise because of misrepresentation at the time of purchase of everything from the family car to the refrigerator. Bankruptcy clients often can read but poorly, some not at all, and rely on the salesman's oral representations. The words on the contract they sign are meaningless to many of them. In *Sauerman v. Stan Moore Motors, Inc.*,[27] a father, who had been a mechanic himself, was buying his son a car. There was a condition known as "blow by" on the 1965 Chevrolet, which caused a great deal of oil loss. Representations were that it was a "very good car—nothing wrong with it—been on the lot about 30 days," when, in fact, the vehicle had been on the lot five months and needed to have a quart of oil added every few miles. The purchaser was entitled to prevail for the rescission and received his money back. Every statement about the property, however, doesn't make a purchase voidable. Sellers are still entitled to a little dealer's puffing.[28]

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24. 86 Iowa 563, 53 N.W. 328 (1892). *See also* Obsekoff v. Mallory, 188 N.W.2d 294 (Iowa 1971); Annot., 64 A.L.R.3d 1251 (1975).

25. 246 Iowa 41, 66 N.W.2d 849 (1954).

26. McClintick v. Widrowicz, Law No. 78586 (Woodbury County Dist. Ct. 1967). *See* 51 C.J.S. *Landlord & Tenant* §§ 180, 320(a) (1968); 52 C.J.S. *Landlord & Tenant* §§ 455-61, 727 (1968) (concerning constructive eviction, restoration to premises and damages).

27. 203 N.W.2d 191 (Iowa 1972).

28. Iowa Code § 554.2313 (1975) (providing that affirmation of value or opinion or commendation of goods does not create warranty).

D. *Malicious Prosecution*

Ashland v. Lapiner Motor Co.[29] involved a purchase on conditional sale of two motor vehicles. When the debtor defaulted, the creditor caused a writ of replevin to issue. The sheriff asked the debtor where the vehicles were and he said one was out of state and he wasn't sure where the other one was. The creditor instituted criminal proceedings against the debtor for embezzling mortgaged property on the theory, apparently, that failure to tell a sheriff where it was, per se, constituted embezzlement. The courts were never forced to reach that issue, however, because, after the debtor had been in jail two days, the creditor fortuitously appeared at the courthouse and agreed to let the debtor out of jail if he agreed to disclose where the property was; furthermore the debtor was to have ten days to redeem the collateral, which he didn't do. Instead he sued the creditor and took care of the matter in that way.

I had a case a few years ago in which my client was behind on his rent at an apartment hotel. They served him with a three-day notice to quit—he quit. He was then prosecuted criminally for defrauding an innkeeper but this was dismissed because he was a month-to-month renter. I sued for malicious prosecution and instead of owing $350.00 he received a $750.00 settlement.

E. *Intentional Infliction of Mental Suffering*

The case of *Curnett v. Wolf*[30] recognized that mental suffering lay as a distinct tort in Iowa without the necessity of meeting the impact rule. In essence, no physical injury is necessary. In *Curnett*, the defendant allegedly owed the plaintiff a substantial debt, and the defendant proceeded to harass plaintiff at his new job in a new state by making adverse comments in a letter of recommendation unless plaintiff dropped his lawsuit against defendant. Because of the threat to his job, plaintiff was able to recover even though he didn't become physically ill.

Amsden v. Grinnell Mutual Insurance Co.[31] indicated that the four necessary elements in a pleading of mental suffering are:

(1) Outrageous conduct;

(2) Defendant's intention of causing damages;

(3) Plaintiff's actual suffering; and

(4) Proximate causation.

In this particular matter, the defendant had not paid its own insured the amount of a fire loss. The court quoted, with approval, the California line of

29. 247 Iowa 596, 75 N.W.2d 357 (1956).

30. 244 Iowa 683, 57 N.W.2d 915 (1953). *See also* Barnett v. Collection Serv. Co., 214 Iowa 1303, 242 N.W. 25 (1932) (regarding threats to contact employer and to sue).

31. 203 N.W.2d 252 (Iowa 1972).

decisions[32] placing the utmost burden for fair dealing on insurance companies, but came to the conclusion that, under the facts as presented at trial, the plaintiff had not made out a case.

Northrup v. Miles Homes, Inc.[33] involved a number of allegedly forged documents which had been executed in blank by the purchasers of a pre-cut home, who had but seventh grade educations. The purchasers owned a forty-acre parcel when defendant's salesman responded to an advertisement which had been clipped and returned to the defendant. Plaintiffs signed a number of documents, which later turned out to be deeds to their homestead, etc., without their knowledge. Plaintiffs alleged $5,000.00 for breach of contract because some of the merchandise wasn't with the order when it came and some was of defective quality, plus other complaints (interestingly enough, it was off-loaded from the manufacturer's truck at the plaintiff's home by backing up sharply towards plaintiff's house, stopping abruptly and letting the merchandise come shooting off the truck, landing in a heap). Plaintiffs received $3,500.00 for breach of contract, $5,000.00 for mental suffering and $15,000.00 for punitive damages for what was a tremendously aggravating situation. It was one of the cases where the defendants didn't do anything right.

A treasure trove of matters which will trigger this tort is reposing in the Iowa Debt Collection Practices Act.[34] I can only think of this tort as one of the most potentially damaging there is for a determined antagonist.[35] I have discouraged a good many of my clients from pursuing this type of litigation because the remedy is sometimes worse than the malady.[36] The original psychic injury is then exacerbated during the pre-trial period, coming into sharpest focus when the trauma is relived in the courtroom. It thus becomes a pivotal point for the client throughout his later life. In these cases I think not only the client but his relatives should help make the value judgment regarding commencement of litigation. This is because of the potential emotional impact on all of them.

F. *Invasion of Privacy*

Almost two decades ago Iowa aligned itself with the tort of invasion of privacy in the case of *Bremmer v. Journal-Tribune Publishing Co.*[37] The

32. Eckenrode v. Life of America Ins. Co., 470 F.2d 1 (7th Cir. 1972) (using California cases as rationale); Silberg v. California Life Ins. Co., 113 Cal. Rptr. 711, 521 P.2d 1103 (1974); Gruenberg v. Aetna Ins. Co., 108 Cal. Rptr. 480, 510 P.2d 1032 (1973); Crisci v. Security Ins. Co., 58 Cal. Rptr. 13, 426 P.2d 173 (1967). *See also* Fletcher v. Western Nat'l Life, 10 Cal. App. 3d 376, 89 Cal. Rptr. 78 (1970).

33. 204 N.W.2d 850 (Iowa 1973).

34. IOWA CODE § 537.7103 *et seq.* (1975).

35. *See* Rugg v. McCarty, 476 P.2d 753 (Colo. 1970); George v. Jordan Marsh Co., 268 N.E.2d 915 (Mass. 1971); Shick, *A Primer on the General Law Applicable to Abusive, Unfair and Harassing Collection Practices*, 6 CLEARINGHOUSE REV. 145-47 (National Clearinghouse for Legal Services, Northwestern University, July, 1972); Note, *Mental Distress from Collection Activities*, 17 HASTINGS L.J. 369 (1965); Comment, *Recovery for Credit Harrassment*, 46 TEX. L. REV. 950 (1968).

36. Amsden v. Grinnell Mut. Reinsurance Co., 203 N.W.2d 252, 255 (Iowa 1972).

37. 247 Iowa 817, 76 N.W.2d 762 (1956).

supreme court affirmed a dismissal of the petition because the incident was sufficiently newsworthy to bring the matter into the public domain. A youngster, kidnapped from home, was found dead in a field. Pictures were subsequently taken of the body, which were then put in the newspaper. The parents having solicited assistance, far and wide, including the news media prior to the body being found, could not then claim any inherent privacy.

Yoder v. Smith[38] again recognized the tort in Iowa but held it inapplicable to an innocuous letter requesting assistance of the debtor's employer by a collection agency. The court held this was not actionable because of the qualified privilege involved, serving a legitimate interest of the employer in the financial affairs of its employee. Patently, such letters are now part of the Debt Collection Practices facet of the Iowa Consumer Credit Code.[39] It is proscribed to contact the debtor's employer or credit union more frequently than every three months[40] to obtain an employer's or credit union's debt counseling services for the debtor. The debtor's spouse may not be contacted at all, without his consent.[41] It is readily apparent that the permissible activities of debt collectors are severely circumscribed from what had been a kind of limbo.

G. *Intentional Interference with Advantageous Contractual Relations*

The Iowa supreme court, in April of last year, decided *Murphy v. First National Bank*,[42] which involved four principal claims that a number of interrelated corporations had been laid low by the actions of four banks. Though the issues decided on appeal were procedural—the supreme court reversing the trial court's order sustaining special appearances and motions to dismiss filed by the defendant-banks—the factual context can herein be noted. The petition claimed the First National Bank in Sioux City asked its depositor to come into the bank to close out a small account with something less than $3,000.00 in it, suggesting issuance of certified checks thereon. The banks then claimed this as an act of bankruptcy when it revealed the actions to its corresponding and participating banks. All banks then filed an involuntary bankruptcy petition. This breach of confidentiality and fiduciary relationship was one of the

38. 253 Iowa 505, 112 N.W.2d 862 (1962). *But see* Barnett v. Collection Serv. Co., 214 Iowa 1303, 25 N.W. 25 (1932) (mental suffering allowed for a collection letter under different facts).

39. IOWA CODE §§ 537.7101-03 (1975).

40. *Id.* § 537.7103(3)(a)(5).

41. *Id.* § 537.7103(3)(a)(8) (1975). *See also* Norris v. Moskin Stores, Inc., 132 So. 2d 321 (Ala. 1961) (abusive language in phone calls); Carey v. Statewide Fin. Co., 223 A.2d 405 (Conn. 1966) (recurring personal visits during convalescence); Passman v. Commercial Credit Plan, Inc., 220 So. 2d 758 (La. 1969) (disclosure of a debt to debtor's employer); Montgomery Ward v. Larragoite, 467 P.2d 399 (N.M. 1969) (asserting to others a debtor's deficiency for failing to pay); Housh v. Peth, 133 N.E.2d 340 (Ohio 1956) (relating to general harassment in the form of constant phone calls with resulting loss of employment). All of these cases held that creditors had violated a debtor's right to seclusion where the activity would be offensive to a reasonable man.

42. 228 N.W.2d 372 (Iowa 1975); *see* Annot., 40 A.L.R.3d 296 (1971).

divisions of the petition and the other three were conspiracy to induce insolvency, abuse of process and, as we are discussing here, interference with advantageous contractual relations. Some of the construction contracts of the bankrupt allegedly were forfeited automatically at the time of the filing of the bankruptcy petition. Now that the case has been reinstated it will be interesting to watch its progress through the courts.

Somewhat analogous litigation is pending in the case of *Grasmon v. Clay County National Bank.*[43] It involves claims of shareholders that its lender "cut if off" from further financing, calling notes that weren't due until sometime in the future. The bank, "feeling insecure," set off the bank account of the depositors, wrote customers of the milling operation about accounts receivable and refused to provide additional promised financing, a replevin suit being instituted by the bank, which it won. The bank now claims issue preclusion by way of res judicata, the same matters having been litigated by the corporation in the replevin suit brought by the bank.

In *Murphy* the claim for damages is $10 million and in *Grasmon* the claims exceed $2 million.

These cases have as their progenitor the matter of *Clark v. Figge,*[44] an action somewhat analogous to *Grasmon,* in which a corporate shareholder brought an action against a bank president for calling various notes and contacting customers of the corporation to make direct payment to the bank. A motion to dismiss in the district court, on the basis of a two-year statute of limitations, was overruled by the supreme court, which held a five-year injury to property statute was applicable and remanded the case for trial on the merits. The bank president allegedly called more than $100,000.00 in notes and extracted more than $3,000.00 from the plaintiff's checking account for recourse contracts discounted at the bank and also caused plaintiff's personal note and its balance to be accelerated. He further failed to release a mortgage, although tender was made, until attorney fees for collection were paid, closed out the bank accounts of the plaintiff and the corporation for which he claimed insolvency and also cut off the corporation's supply of merchandise from its wholesaler. Plaintiff claimed $200,000.00 compensatory and $100,000.00 exemplary damages.

An interesting quote appears in *Clark* from the earlier case of *Boggs v. Duncan-Schell Furniture Co.*[45] as follows:

> The integrity of the social order, the stability of business itself requires, and the law should require, that every man conduct himself in full recognition of the fact that he is a member of that social order; that he not only has rights, but he has corresponding duties; and that the performance of those duties is as binding upon him as a member of the social order as are the rights given to him. Men, as members

43. Civil No. 73-C-3088-W (N.D. Iowa 1975). *See* Annot., 40 A.L.R.3d 296 (1971).
44. 181 N.W.2d 211 (Iowa 1970).
45. 163 Iowa 106, 143 N.W. 482 (1913).

> of organized society, under the law, have the right to do certain things; but that right is restricted and limited by the duty imposed upon them not to exercise those rights wantonly and wilfully to the injury of another. In the exercise of the law-given right, the well-being of the social order requires that each person should exercise his right consistently with the fact that he is a member of the social order out of which his rights grew. While a person has a right to pursue his avocations and his business for his own pleasure and profit, he has no right, directly or indirectly, to wilfully and maliciously injure another in his lawful business or occupation.[46]

In *Boggs*, the defendant made a concerted attempt to run plaintiff out of business. Factually, it concerns a new dealer in town for the White Sewing Machine Company, who so angered the previous agent that he cut the price of old machines in half and advertised them as new in order to drive the new agent out of town because he was supposedly undercapitalized. The new agent may not have had the financial acumen of Duncan-Schell but, nevertheless, he had the old "equalizer," a good attorney. This case reads well and gives one an insight into the philosophy of our judges at the time. The argument of the furniture company was that it could advertise anything it wanted to, whenever it wanted to, and that advertising, per se, violated no law, thus, how could evil motives make an otherwise legal act actionable?

Another case involving the possibility of a man losing his job was *Bishop v. Baird & Bcird*,[47] in which wages were withheld pursuant to a five year old wage assignment. A conditional sales contract had been written on a motor vehicle, which was returned one month and nine days after purchase, one-third of the purchase price having been paid for a full credit on the balance of the contract. Five years later the debtor's employer was given notice of assignment of the wages and proceeded to withhold sums due the wage earner and was not pleased with the whole operation. The debtor commenced an action in equity to determine that the sales contract was cancelled; the defendants, Baird & Baird, were also the attorneys for the sales company and finance agency. Judgment was entered against all defendants in the trial court and affirmed in the supreme court.

H. *Extortionate Collection Practices*

The Iowa Debt Collection Practices Act proscribes the use, or express or implicit threat of use, of force, violence or other criminal means, to cause harm to a person or to property of a person,[48] as well as the false accusation or threat to falsely accuse a person of fraud or any other crime,[49] which ordinarily

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46. Boggs v. Duncan-Schell Furniture Co., 163 Iowa 106, 114, 143 N.W. 482, 485 (1913).
47. 238 Iowa 871, 29 N.W.2d 201 (1947).
48. IOWA CODE § 537.7103(1)(a) (1975).
49. *Id.*

carries five years in the penitentiary.[50] *Quaere* if the criminal sanctions within the Consumer Credit Code,[51] amounting to an indictable misdemeanor, emasculate our former extortion statute as it relates to debt collection practices or, alternatively, provide merely a cumulative remedy? A similar provision in federal law[52] involves up to twenty years in the penitentiary for using extortionate means for collection of debts.

I. *Civil Rights Violations*[53]

Several years ago I had a client who worked as a speech therapist for the Plymouth County Board of Education, earning $11,000.00 annually, who had the audacity to file a bankruptcy petition. At the time his contract was up for renewal he was called before the Board and informed he was expected to pay back all of his bills, certainly the ones to the LeMars and other Plymouth County merchants, or he definitely shouldn't be anticipating a teaching contract for the following year. My client was working on his master's degree at the time and has since received his doctorate. I interceded for him before the school board at a hearing, taking a court reporter along, and was given much the same story. I stated to the board by way of veiled threat that even an animal, when cornered, will fight back, and that it should not use the exercise of a right provided in the Constitution of the United States,[54] insofar as it relates to the establishment of uniform laws on the subject of bankruptcies throughout the United States, to deny my client equal protection of the laws.[55] The board offered a contract, but at $8,500.00. A temporary restraining order and preliminary injunction were issued and before the case reached trial on the merits, it was settled, my client receiving one-half his normal pay, $5,500.00, for half-time work, rather than the $8,500.00 the school board offered him for full-time work. He was then able to go back to school and work on his doctoral program on a full-time basis, while working part-time.[56] In this case I relied on *In Re Hicks*,[57] in which a Syracuse, New York fireman, after filing bankruptcy, had been fired because he had failed to pay his debts as provided by municipal ordinance. The federal appellate court gave short shrift to this argument by the city in the only other case I was able to find which was in point at the time.

Just recently I noted the case of *Rutledge v. City of Shreveport*,[58] in which a city policeman was discharged for failure to pay debts under the same type of municipal ordinance used in the *Hicks* case. Judge Stagg held the city

50. *Id.* § 720.1.
51. *Id.* § 537.5301(4).
52. 18 U.S.C. § 891(7) (1970).
53. 42 U.S.C. § 1983 *et seq.* (1970).
54. U.S. CONST. art. I, § 8.
55. U.S. CONST. amend. XIV, § 1.
56. *In re* Canell, Civ. No. 72-Bk-3001-W (N.D. Iowa 1972).
57. 133 F. 739 (1905).
58. 387 F. Supp. 1277 (W.D. La. 1975).

police department's rules subjecting to discipline, including dismissal, any policeman failing to pay debts contravened the purpose of the Bankruptcy Act as applied to Rutledge, and was thus invalid under the supremacy clause.

Perez v. Campbell[59] held that bankruptcy discharges a claim for motor vehicle personal injury or property damage under state financial responsibility acts requiring continuing payment to keep a driver's license or registration certificate, also under the supremacy clause. Bankruptcy Act purposes were paramount to state laws. This case is particularly useful in the event a client has lost his license or plates, or both, or he's paying off a large sum in installments, pursuant to an agreement[60] allowing him to keep his license. *Perez* overruled earlier decisions that a discharge in bankruptcy did not relieve the bankrupt from requirements under a financial responsibility law if he wanted to drive a motor vehicle.

An allied case to *Perez* was *Bell v. Burson*,[61] which held a motor vehicle operator's permit could not be suspended simply because the driver had no insurance under a financial responsibility act. In essence, there had to be a due process hearing with an opportunity to present evidence as to ultimate liability and a person could not be discriminated against simply because he had no insurance at the time of a collision insofar as suspension of privileges be concerned.

Goldberg v. Kelly[62] held financial aid to the indigent could not be suspended without notice and hearing. A developing area of the law that public utilities could not terminate service without notice and hearing was laid to rest recently in *Jackson v. Metropolitan Edison*,[63] when the United States Supreme Court indicated that a public utility granted a charter under Pennsylvania law was not sufficiently connected with the state for purposes of the fourteenth amendment to make the termination of service state action.

J. *Contract Rights*

Many debtors come to our offices because of the tremendous pressures from high medical and hospital bills and indicate they had insurance policies covering the loss but the insurer declined to pay anything, or only a portion of the claim. Few of the debtors have actually seen their policies nor will they have a copy of them. You must contact the insurer and make your own determination that this is not a fertile field for recoupment of a sum sufficient to get the monkey off your client's back and onto the carrier's, where it properly

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59. 402 U.S. 637 (1971).
60. IOWA CODE § 321A.6(4) (1975).
61. 402 U.S. 535 (1971).
62. 397 U.S. 254 (1970).
63. 419 U.S. 345 (1974). See *Indigency As a Defense to Utility Termination or What to Do Until Summer Comes*, 6 CLEARINGHOUSE REV. 79-83 (National Clearinghouse for Legal Services, Northwestern University, June, 1973) for a tongue-in-cheek title on this subject.

belongs. There may have been other claims which the client did not pursue, such as uninsured motorist, property damage on one or more of his own vehicles (the agent has told him—you don't want to raise the premium by presenting a claim, do you?), homeowner's property damage, etc. The case of *Amsden v. Grinnell Mutual Insurance Co.*[64] deals extensively with the rights of an insured against his insurer. It has been my experience that carriers are always happy to accept a premium but, when it's time to pay a claim, they are looking around for a policy exclusion or, alternatively, choose to be penurious in their treatment of their own insureds. It is very difficult for me to comprehend how the same insured, who is a pillar of the community or the policy wouldn't have been issued to him, suddenly becomes a leach when he has the gall to make a claim on his policy. Coverage is not sought by an insured hoping for a loss, except for the demented arsonist or someone of his ilk. The insured wants himself to be protected and, inferentially, as third-party beneficiaries thereof, the public at large. Cataclysms we don't need, treatment of claims in other than the manner a bull looks at a bastard calf is mandated.

K. *Rent Deposits*

The Sixty-fifth General Assembly of Iowa added to our statutes regarding landlord and tenant, providing, among other things, for refund of rent deposits.[65] The burden of proof as to the reason for withholding any or all of the rent deposit shall be on the landlord.[66] Punitive damages up to $200.00 for withholding rent deposits, in addition to actual damages, may be levied against a recalcitrant landlord.[67]

L. *Replevin, Repossession & Resale*

Mitchell v. W.T. Grant Co.[68] supposedly was the death knell for *Fuentes v. Shevin.*[69] *Fuentes* had held Pennsylvania and Florida replevin statutes to be invalid because of failure to pass constitutional muster on procedural due process grounds. Three months after this case, the Iowa supreme court decided *Thorp Credit, Inc. v. Barr*,[70] with a similar holding. *Mitchell* was thought to say that the slight modifications in the Louisiana law, in essence providing for sequestration of property, issuance of process by a judge rather than a clerk, and certain other matters, were procedurally sufficient to blunt, if not kill, *Fuentes*.

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64. 203 N.W.2d 252 (Iowa 1972). *See also* cases cited in note 32 *supra*.
65. Iowa Code § 562.8 *et seq.* (1975).
66. *Id.* § 562.10.
67. *Id.* § 562.14. *See* Johnson v. Riverside Hotel, Inc., 399 F. Supp. 1138 (S.D. Fla. 1975); Collins v. Viceroy Hotel Corp., 338 F. Supp. 390 (N.D. Ill. 1972); Iowa Code ch. 538 (1975).
68. 416 U.S. 600 (1974).
69. 407 U.S. 67 (1972).
70. 200 N.W.2d 535 (Iowa 1972).

Most recently, however, the United States Supreme Court decided *North Georgia Finishing, Inc. v. Di-Chem, Inc.*,[71] in which one of the justices remarked that—much as Mark Twain had stated many years before—reports of the death of *Fuentes* were vastly exaggerated. The court held in *Di-Chem* that attachment of a corporation's bank account, prior to securing judgment, did not pass due process muster. Surely if a corporate bank account cannot be attached for non-payment of an obligation, procedural due process is alive and well and living in the United States. Insofar as consumer credit transactions be concerned, there can no longer be any garnishment or attachment before judgment in Iowa,[72] and *Di-Chem* is broad enough to fit all attachment situations, I opine. The question of whether self-help repossessions, without hearing, constitute a denial of due process seems to be answered negatively and state action is not involved under section 9-504 of the *Uniform Commercial Code*,[73] although earlier cases indicated to the contrary.

Guzman v. Western State Bank[74] held the fourteenth amendment's due process clause was violated by a North Dakota sheriff's summary seizure of a mobile home used as a residence. The mobile home was bought pursuant to an attachment under a defaulted installment contract upon the creditor's sworn complaint, accompanied by an affidavit which did not need to set forth the necessity of summary procedure to avoid destruction or concealment of the property or to preserve the creditor's property interest therein, the debtor having to post a bond in order to obtain a post-seizure hearing under North Dakota law.

Until there is a definitive Iowa decision, it would certainly be my opinion that since consumer credit sales transactions are carried out on standard pre-printed forms, there is almost never an opportunity for bargaining about terms, except repayment and interest, thereby resulting in classic adhesion contracts.[75] This gives rise to a legitimate inquiry as to whether there has been any meaningful assent to the specific contract terms, which include the right to repossess[76] "unless otherwise agreed. . . ." The requirement of peaceful repossession will doubtlessly be liberally construed to discourage extra-judicial acts. The three cases whose facts I found most bizarre could well be entitled, "Automobile Rustling," "Listen, Punk, We're Taking that Lawnmower!" and "Don't Take Your Gun to Town!" The case involving automobile rustling is one of the most intriguing opinions that I have ever read in which John P

71. 419 U.S. 601 (1975). *See also* Annot., 18 A.L.R. Fed. 223 (1975); Annot. A.L.R.3d 814 (1975).
72. IOWA CODE § 537.5104 (1975).
73. Adams v. Southern Cal. First Nat'l Bank, 492 F.2d 324 (9th Cir. 1973); Optical Laboratories, Inc. v. Marquette Nat'l Bank, 487 F.2d 906 (8th Cir. 1973) *also* Annot., 65 A.L.R.3d 1284 (1975); Annot., 45 A.L.R.3d 1233 (1972).
74. 516 F.2d 125 (8th Cir. 1975).
75. IOWA CODE §§ 537.5108, 554.2302 (1975).
76. IOWA CODE § 554.9503 (1975).

Brown, Chief Judge of the Fifth Circuit Court of Appeals, opens with these words in the case of *Klingbiel v. Commercial Credit Corp.*:[77]

> When Vern Klingbiel (purchaser) went outside his home in St. Louis, Missouri, on the morning of June 22, 1966, he found his brand new (1966) Ford Galaxy 500 gone. Later he was to learn that in the dark of night and with skillful stealth the car—despite it being fully locked—had been taken away, not by some modern auto rustler, but by an anonymous representative of the Automobile Recovery Bureau acting for Commercial, the installment finance company, which was described with remarkable accuracy as a "professional firm."[78]

The purchaser was not even in default at the time of repossession, the first payment not having fallen due, but the finance company attempted to rely on an acceleration clause in the event it "felt itself insecure." Judge Brown cogently pointed out that even though the right of acceleration existed, the finance company was still compelled to make demand on buyer for payment of the amount involved under the terms of the contract; thus, it had the right to accelerate and demand payment in full but, absent such demand, any retaking of the vehicle by the "night riders" became conversion. The appellate court upheld the jury's award of $700.00 compensatory and $7,500.00 punitive damages.

Morris v. The First National Bank & Trust Co.[79] involved the repossession of a heavy-duty rotary power mower. The court, again, had to decide what constituted peaceable repossession under section 9-503 of the *Uniform Commercial Code*. In this case:

(1) Buyer was in default to the bank and had sent its agent to effect repossession on April 13, 1966. Buyer told him to get off the premises and then indicated to him he wasn't to enter the property again. On May 9, 1966, the bank's men returned, in a threesome this time, but the buyer was off on some errand and only his son remained but the mower was in plain sight near a tool shed. The son told the men to get off the property since they were trespassing, noting the earlier ejection by his father of the bank's agent from the premises. The son told the bank's agents that they couldn't take the mower, at which time they surrounded him and he made no further resistance.

(2) Buyer then filed an action for damages based upon trespassing and conversion. The bank moved for summary judgment, which was granted, dismissing buyer's case, and the summary judgment was upheld in the court of appeals. The Ohio supreme court reversed, citing an earlier Ohio case which indicated that, "a breach of the peace is a violation of public order, a disturbance of public tranquility, by any act or conduct inciting to violence or tending to provoke or excite others to break the peace. . . ." The court felt that surrounding the buyer's son by three men put him in sufficient fear that he

77. 439 F.2d 1303 (10th Cir. 1971).
78. Klingbiel v. Commercial Credit Corp., 439 F.2d 1303 (10th Cir. 1971).
79. 21 Ohio 2d 25, 254 N.E.2d 683 (1970).

had no further duty to continue to resist since he was fearful of "being beaten," according to his affidavit resisting the motion for summary judgment. Thus it was held no actual assault need be committed by the bank's agents in order for them to have committed a breach of the peace.

Finally, the case of *Stone Machinery Co. v. Kessler*[80] involved an attempted peaceful repossession of road machinery in Oregon when the replevin action was brought and the writ issued in Washington. The secured party took his "hired gun" along in the form of the sheriff, finding the buyer along the river bank engaged in construction work on a government contract. Buyer had paid approximately $17,200.00 on a $23,500.00 purchase of the D-9 Caterpillar tractor purchased on conditional sales contract. Before commencing a replevin action, the secured party had attempted to peacefully repossess the equipment and had been told that the buyer would not relinquish possession of the tractor at that time, or any time in the future, in the absence of proper judicial proceedings showing seller's right to repossess and that "someone would get hurt" if an attempt was made to repossess without "proper papers." When the sheriff and the seller appeared at the Oregon river bank, they were asked if they had any papers, after they indicated they had come to pick up the tractor. "No," they said. The buyer protested the taking of the tractor but offered no physical resistance because, he indicated, "he didn't think he had to disregard an order of the sheriff." Compensatory damages of $24,900.00 were upheld for the conversion of the machinery but a punitive damage award of $12,000.00 was reversed since the court held it was reasonable to take the sheriff along to protect the peace when force had been threatened by the debtor. The sheriff's mistake was acting under color of his office and aiding in the repossession.

Two fairly recent Iowa cases, *Twin Bridges Truck City, Inc. v. Halling*[81] and *Beneficial Finance Co. v. Reed*[82] held that it was impossible to receive a deficiency judgment without proper disposition of the collateral, notice of sale, etc.[83] It seems to make it equally incumbent upon the creditor to properly dispose of the collateral within ninety days or face the prospect of conversion if 60 percent of the purchase price had been paid.[84] In *Beneficial* the notice of sale was defective and there was a gross disparity in the value of the vehicle at sale as opposed to the reasonable value thereof, giving rise to doubts as to commercial reasonableness. The creditor recovered no deficiency because of its failure to dispose of the collateral properly and to give reasonable notice to the debtor as to time and place of sale. Thus, from both a pleading and proof standpoint, all the bases had to be touched. My advice is to append a copy of

80. 1 Wash. App. 750, 463 P.2d 651 (1970).
81. 205 N.W.2d 736 (Iowa 1973).
82. 212 N.W.2d 454 (Iowa 1973). *See also* IOWA CODE § 537.5103 (1975).
83. IOWA CODE § 554.9504 (1975).
84. *Id.* § 554.9505.

the notification to the petition, together with a copy of the return receipt card, if there be one, so that notice cannot be later disputed.

M. *Breach of Warranty*

Because of his relative ineptness in the market place, subjecting him to fraud and deceit mentioned previously in part VI, section C, *supra*, the debtor may similarly possess causes of action for breaches of the implied warranties of merchantability[85] and fitness for a particular purpose.[86] If the debtor made complaints which were not remedied by the seller, rejection may be made for non-conformity,[87] leaving the seller the option of curing the defect,[88] presuming the right to reject was executed within a reasonable time.[89] There can also be a revocation of acceptance[90] also taken within a reasonable time. I've used revocation of acceptance in several cases including motor vehicles and trailer homes, coupled with truth-in-lending damages mentioned *infra*.

N. *Forfeiture of Real Estate Contracts*

I recently had a case[91] involving the completed forfeiture on a real estate contract,[92] when the conditional vendee was one business day late in tendering the delinquency and the conditional vendor insisted upon strict forfeiture. I based my arguments on the proposition that the forfeiture of land contracts in Iowa was an unconstitutional denial of property without due process of law, prohibited under the Iowa Constitution[93] and the United States Constitution,[94] because the conditional vendees have neither an opportunity to be heard nor reasonable opportunity to apprise themselves of the true facts before the forfeiture is effected. In addition, the forfeiture of all credit for previously-made payments, without allowing a one-year period of redemption otherwise allowed by the provisions for real estate foreclosure,[95] or such shorter period or time as may be agreed upon by the parties,[96] constitutes a provision for assessment of liquidated damages by way of all previous payments made. The Indiana court in *Skendzel v. Marshall*[97] held, *inter alia*, to allow the amount paid prior to the forfeiture as liquidated damages is inconsistent with generally accepted principals of fairness and equity, and judgment for the vendor was

85. *Id.* § 554.2314.
86. *Id.* § 554.2315.
87. *Id.* § 554.2601.
88. *Id.* § 554.2508.
89. *Id.* § 554.2602(1).
90. *Id.* § 554.2608.
91. Beller v. Sioux City Federal, Equity No. 91797 (Woodbury County Dist. Ct., filed June 18, 1974).
92. IOWA CODE ch. 656 (1975).
93. IOWA CONST. art. I, § 9.
94. U.S. CONST. amends. V, XIV § 1.
95. IOWA CODE § 628.3 (1975).
96. *Id.* §§ 628.26-.27.
97. 301 N.E.2d 641 (Ind. 1973).

reversed, the vendee having acquired a sizable interest in the property, which, if forfeited, would result in substantial injustice. The court went on to hold that the mortgage foreclosure statute applies to prevent inequitable forfeiture in conditional land contracts, and that the vendor's right was one of a lien upon real estate, so that the mortgage foreclosure statute, less harsh on the vendee than forfeiture, should be used to enforce the vendor's interest. On remand the trial court was instructed to enter a judgment of foreclosure on the vendor's lien under a mortgage foreclosure statute and to order payment of unpaid principal balance plus interest, the trial court being further directed to similarly utilize all proper and equitable relief, including discretion to issue stay of judicial sale on the property.

Turner v. Blackburn[98] held that the sale by a trustee, pursuant to the right given in a mortgage, was invalid. This type of procedure again failed to pass muster from a constitutional due process standpoint. In North Carolina the foreclosure procedure involves posting of notice of sale on the courthouse door and publication in the newspaper, nothing being given to the mortgagor personally. A report of the sale is filed within five days with the clerk of the county court and, if the debt be not satisfied or an upset bid filed within ten days after the filing of the preliminary report, the rights of the parties to the sale become fixed. This was a three-judge court case and it overturned the equivalent of a cognovit note insofar as the trustee would no longer be allowed to exercise a power of sale in this fashion in North Carolina. We recently adopted a similar provision insofar as consumer credit transactions not being subject to a confession of judgment in advance of default here in Iowa.[99]

I pointed out to my adversary my client's home was worth $18,000.00 at the time of the forfeiture and a balance of only $8,500.00 was owed, a gross inequity. I also cited *Pernell v. Southall Realty*,[100] in which the United States Supreme Court decided the right to recover possession of real property was ascertained and protected at common law, entitling either party to the action to demand a trial by jury, pursuant to the seventh amendment to the United States Constitution. Thus, if an action for ejectment was commenced by the conditional vendor and a jury demanded by the buyer, it would be hard to believe that such a jury would find the equities with the bank in such circumstance—it's simply too harsh an injustice to work. I went on to indicate it seemed logical to me that savings and loan associations are obligated to pay interest on the escrowed monies they are holding for their mortgagors and vendees; in essence, an unjust enrichment theory precluding the bank from paying no interest on the deposits it requires for insurance and tax reserves. I finally pointed out I represented one of the banks in town, as well as a number of loan companies, and that suits of this sort were better avoided by settlement than

98. 389 F. Supp. 1250 (W.D.N.C. 1975).
99. Iowa Code § 537.3306 (1975).
100. 94 S. Ct. 1723 (1974). *But see* Brienze v. Collins, 335 A.2d 670 (Md. Ct. App. 1975).

litigation. For these and a myriad of other reasons, the case was settled, the clients being allowed to pay off the lending institution, securing their financing elsewhere. The best of all possible worlds would have entailed a reinstatement of the contract at a rate slightly in excess of 7 percent rather than procuring new money at 9 percent but saving approximately $9,000.00 by way of principal constituted a substantial success, in any event, settlement being delayed until the loan association had become apprised of the situation.

O. *Truth-in-Lending Act*

The Truth-in-Lending aspect of the Consumer Credit Protection Act [101] provides minimum damages of $100.00 and maximum damages of $1,000.00, plus reasonable attorney fees, for each violation. If a lien on real property is involved in certain circumstances and no three-day notice of right to rescind be given, it is possible to have your cake and eat it, too, insofar as retention of the improvement to the property, plus damages for disclosure violations,[102] brought within one year of the violation.[103]

P. *Fair Credit Reporting Act*[104]

This Act provides for recovery of substantial damages under certain circumstances and the least we should do is visit the debtor's local credit bureau to determine what information it has in its file and what information has been forwarded the debtor about inquiries concerning him. Straight bankruptcy proceedings must be deleted from a credit report after fourteen years and for a wage earner plan, like most other information, after seven years.

Q. Odometer Violations

The federal law[105] provides a *minimum* of $1,500.00 damages with a maximum of *three times the actual damages plus reasonable attorney fees*, for turning back the mileage on a motor vehicle. This section is much stronger than the relatively recently-enacted Iowa law,[106] which doesn't set out specific civil penalties but does make it an indictable misdemeanor with a fine of up to $1,000.00 and imprisonment for up to ninety days for a violation. The federal action must be brought within two years of its accrual and became effective in January, 1973. If anyone is susceptible to purchase of a car with the mileage altered, it is the potential bankrupt, who seems to get the proverbial neck of the chicken repeatedly.

I had two cases involving turned-back odometers before either the Iowa or

101. 15 U.S.C. § 1601 *et seq.* (1970).
102. *Id.* § 1635.
103. *Id.* § 1640.
104. *Id.* § 1681.
105. *Id.* § 1989.
106. IOWA CODE § 321.71 (1975). *See* H.F. 498, 66th G.A. (1975).

federal law became effective. Both involved deputy sheriffs of Woodbury County, one of whom, as I recall, had purchased a car with 24,000 miles on it, allegedly, when, in fact, it was closer to 50,000 miles; and another who purchased a car thinking it had 12,000 miles on it when it was in excess of 30,000 miles. One of the cases was settled by way of recission, my client getting all of his money back, and the other by way of a complete pay-off of his note to the bank and a free lease of a new vehicle for a year. Obviously, the potential damages are much greater now with the federal act. It's enough to prompt you to have a check list to fill out for every client. In essence: when did you buy your vehicle and from whom, checking with the previous owner if it was sold through a dealer in order to check the mileage on the car. This is the way I tracked down both of the cases involving the deputy sheriffs.

VII. Assistance of Counsel

The sixth amendment to the United States Constitution guarantees the right to counsel, and this has been construed to mean the right to an *effective* lawyer. To assist a bankrupt, presuming the decision be made to go ahead with the filing of a petition, much more than the purely perfunctory task of filling in the blanks on the form need be performed. One must convert non-exempt property into exempt assets as promptly as possible in order to save what little there may be for your client. Of course he has a duty to his creditors, but his paramount duty is to himself and to his family. One must make sure that the bare minimum, or nothing, remains in assets to be administered by the trustee, as his rights are so broad under section 70 of the Act.[107]

We must handle post-filing claims for reclamation of property by secured creditors. Before any property is turned over to the creditor, it must be shown that it had a valid security interest therein; if not, there would be no recovery if the matter went to court and it would be a disservice to the client to simply abrogate any further interest in him after collecting your fee, filing the petition and attending the first meeting of creditors.

You must prepare to fight any application for determination of dischargeability under section 17 of the Bankruptcy Act.[108] Other roles you will play follow:

(a) Attempting to assist the bankrupt in securing employment.
(b) Writing a letter to a prospective creditor, indicating to him just what prompted the filing of a bankruptcy petition by your client, indicating his good character rather than heedless disregard for earlier obligations.
(c) As indicated before, attempting to bolster the self-image of the bankrupt.

107. 11 U.S.C. § 110 (1970).
108. *Id.* § 35.

(d) Advising, at length, as to the problems the bankrupt will face after the filing of the petition and determining if it be not possible to file a wage earner plan so that all creditors can receive full payment; some of the reasons for selecting a wage earner plan, as opposed to a straight bankruptcy, follow:

(1) Some obligations are non-dischargeable taxes for example, and they might as well be paid off on a weekly or monthly basis in a wage earner plan than fighting off the "Revenuers" by way of a holding action.

(2) The debtor may be unable to later obtain credit if a straight bankruptcy be filed and, if so, only at higher interest rates.

(3) Some employment may be closed to the debtor or his application prejudiced because employers want employees with proven ability to manage money so they will not be worried about financial problems or be dipping into the till for an unearned "bonus."

(4) Bankruptcy may well be a continuing embarrassment to the family and friends of the debtor; many look on bankruptcy as failure to live up to the moral obligations regardless of the legality of the discharge in bankruptcy. Fellow employees of the debtor might see the filing of the petition as a blot on his character.

(5) Except for a very callous person there is bound to be a tremendous loss of self-respect on the filing of a straight bankruptcy petition rather than a wage earner plan; without the emotional catharsis of repayment, the moral overlay of being a bankrupt has caused people unnecessary emotional trauma when the repayment plan is available to them and properly explained.

Rejection of a wage earner plan would be for the following reasons:

(1) A client may not be sufficiently motivated to be willing to live in a state of self-deprivation, when the execution of the petition would remove the legal obligation of payment upon most of the debts and the moral obligation is meaningless to him.

(2) A sporadic work record for the client might indicate he would be unable to live up to any particular plan because his earnings were so erratic that they could not be counted upon to carry a plan through to fruition.

(3) That debtor may have an insufficient income to cover current family expenses, without worrying about old debts.

VIII. Conclusion

Acting as counsel for bankrupts involves many facets of the law, particularly concerning secured transactions. We are licensed in federal court to act as attorneys and *counselors* at law. This counseling function is our most important role, and we owe absolute fealty to our clients to give them the best advice we have available, understanding full well that we can't litigate all causes of action for all clients on all matters. Picking our spots so that the

secured creditors know we mean business when we say that our client's security is not going to be retaken, and in the event they file a possessory action, that they will face a counterclaim far in excess of the amount claimed, usually dampens their spirits, presuming that we go through with enough cases to keep the opposition honest. For many years ninety percent of all cases presented to lawyers and accepted by them were settled without suit, and of the cases submitted, only ten percent of them were tried, so that one case in a hundred actually reached the jury or the trial court. Attend to detail diligently and hope a few of your suggestions bring about desired results. It is fine to want to restrict a practice to serious personal injury cases, probate of million dollar estates and representation of corporate clients with large bank balances, but many of the clients we represent are not the "pillars of the community," and it is for each of them we must attempt to wade through a morass of entanglements, both personal and financial, in order to arrive at some logical plan for managing their affairs. All we can do is try, as it is this spirit of public service which distinguishes our profession from a business or trade where gaining a livelihood is the entire purpose.[109]

We can thus help our clients by setting them on a straight course for a change so that they will leave the office saying, "Going to Build Me a Mountain!"

"He's *still* got the action" is a consummation devoutly to be wished.

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109. R. POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 5, 6 (1958).