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Commercial Law

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COMMERCIAL LAW

I. COMMERCIAL DEALINGS: SECURED TRANSACTIONS AND CONTRACT PERFORMANCE

In *Barth Brothers v. Billings*,[1] the Wisconsin Supreme Court considered the issues of attachment and enforcement of security interests. Commenced as a garnishment action, the issues were raised by two impleaded defendants after $29,308.24 had been paid into court and the garnishee defendant, Farm Loan Service, Inc., was discharged from all liability. The controversy centered on the proceeds of sale from sixty-six cows auctioned off by the debtor's wife, with Production Credit Association (hereinafter PCA) and Barth each asserting an interest therein.

PCA claimed the funds based on notes and security agreements signed by the Billings over a two year period which gave PCA security interest in property described as security

> for the payment of all existing and future indebtedness of Debtor to Secured Party, and of all renewals and extensions thereof, and any and all additional loans and advances hereafter made by Secured Party to Debtor prior to the filing of a record of Termination Statement.[2]

In addition to describing certain property, all of the security agreements provided a security interest to be given in "All property similar to that described . . . which at any time may hereafter be acquired by the Debtor. . . ."[3] A financing statement was filed ten days after the signing of the original security agreement covering "All machinery, All Cattle, All Feed, All Equipment, Auto, and Truck" and any proceeds from the collateral.[4]

Barth based his claim to the proceeds on four notes signed by the Billings in 1971 and 1972, each of which contained a notation providing that it was secured by a financing statement filed with the register of deeds. However, the boxes designating proceeds on the financing statements were left unchecked. These notes were taken for livestock sold to the debtor by Barth, and three of the financing statements were filed within

1. 68 Wis. 2d 80, 227 N.W.2d 673 (1975).
2. *Id.* at 82, 227 N.W.2d at 675.
3. *Id.* at 82-83, 227 N.W.2d at 675.
4. *Id.* at 83, 227 N.W.2d at 675.

ten days of the notes being signed. Prior to the auction, Barth contacted Mrs. Billings and walked around the barn-yard identifying the cows he had sold by checking ear tag numbers.

On appeal the Wisconsin Supreme Court affirmed the trial court findings, holding that: (1) PCA had a valid perfected security interest in the cows sold at auction and the proceeds, (2) Barth did not have an enforceable security interest, and (3) Barth did not have a purchase money security interest in the cows which would give him priority over PCA's claim.

The court found that PCA had perfected its security interest under sections 409.203[5] and 409.204[6] relating to enforceability and attachment and section 409.302 relating to the filing of a financing statement. The after-acquired property clause and the future advance clause, whether or not given pursuant to commitment, were also legally sufficient.[7] Barth's argument that section 409.204 required new value to be given was based on section 409.108,[8] but the court easily disposed of this contention by relying on the plain language of section 401.201(44), which provides in part: " 'Value.' Except as otherwise provided . . . a person gives 'value' for rights if he acquires them: . . . (b) As security for or in total or partial satisfaction of a preexisting claim." In reaching its conclusion, the court followed the well accepted interpretation that section 409.108 was principally important in insolvency proceedings under the Federal

5. The significant portion is § 409.203(1)(a) and (b) which read:

(1) Subject to . . . a security interest is not enforceable against the debtor or third parties unless:

(a) The collateral is in the possession of the third party; or

(b) The debtor has signed a security agreement which contains a description of the collateral. . . .

§ 409.203 (1971) was amended by § 409.203 (1973) but without substantial effect to the case at hand.

6. WIS. STAT. § 409.204(1) (1971) reads in part:

A security interest cannot attach until there is agreement (s. 401.201(3)) that it attach and value is given and the debtor has rights in the collateral.

7. WIS. STAT. § 409.204(3) and (5) (1971) have since been amended by Wis. Laws 1973, ch. 215 but without substantial change or effect on the outcome of this case.

8. WIS. STAT. § 409.108 (1973) refers only to "new value," and reads:

Where a secured party makes an advance, incurs an obligation, releases a perfected security interest, or otherwise gives new value which is to be secured in whole or in part by after-acquired property his security interest in the after-acquired collateral shall be deemed to be taken for new value and not as security for an antecedent debt if the debtor acquires his rights in such collateral either in the ordinary course of his business or under a contract or purchase made pursuant to the security agreement within a reasonable time after new value is given.

Bankruptcy Act and state law wherein certain transfers for antecedent debts are voidable as preferences.[9] Therefore, value may consist in, and a security interest may be given for, a pre-existing debt.[10]

As to Barth, no security interest existed because there was no signed security agreement. The filed notes signed by Billings with accompanying notations that they were secured by Financing Statements describing the collateral were held insufficient to create a valid security interest because for a security interest to attach there must be an agreement that it attach,[11] and to be enforceable against the debtor or a third party the secured party must either have possession of the collateral or the debtor must have signed a security agreement describing the collateral.[12] The Wisconsin court reiterated the established rule[13] that while it is possible for a single document to serve both the function of a financing statement and a security agreement, it is not possible for a financing statement, without a debtor's grant of a security interest, to serve as a security agreement.

Barth, in an attempt to overcome the deficient security agreement, contended that he had taken possession of the cattle. The trial court found that his acts of identification were insufficient to constitute possession which required the unequivical act of taking physical control of the cattle or of segregating his cattle from the others.[14] The Wisconsin Supreme Court concurred, noting that even if such possession had occurred, it would have been irrelevant because PCA's claim had been perfected prior to the alleged possession.

Barth's remaining theory to support a claim to the proceeds rested on the priority given purchase money security interests under section 409.312(4).[15] However, section 409.312(4) requires

9. 3 ULA - UCC § 9-108, Comment. *See also In re* Platt, 257 F. Supp. 478 (E.D. Pa. 1966).

10. J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE (hereinafter WHITE & SUMMERS) § 23-24 (1972).

11. 68 Wis. 2d at 82, 227 N.W.2d at 675.

12. *Id.*

13. *E.g.*, L. and V. Co. v. Asch, 267 Md. 251, 297 A. 2d 285 (1972); Kaiser Aluminum and Chemical Sales, Inc. v. Hurst, 176 N.W.2d 176 (Iowa 1970).

14. WHITE & SUMMERS, *supra* note 10, at § 23-10.

15. WIS. STAT. § 409.312(4) (1971) reads:

A purchase money security interest in collateral other than inventory has priority over a conflicting interest in the same collateral if the purchase money

that the security interest be perfected within ten days of the debtor's receiving possession. This was clearly not complied with.

Thus, the rule of *Barth Brothers* reaffirms the prevailing view that: (1) a pre-existing debt is sufficient to constitute the value required by section 409.204(1) for the attachment of a security interest in after-acquired property, and (2) a financing statement and a security agreement may be one and the same only if the financing statement contains a grant of a security. More importantly, however, is the court's determination that section 409.108 does not invalidate security interest in after-acquired property where the value given is for a pre-existing debt.

In *Toulon v. Nagle*,[16] section 401.110,[17] a provision unique to the commercial codes of Wisconsin and Nevada, was construed for the first time.[18] Generally, the purpose of section 401.110 is to permit transactions entered into prior to the effective date of the Uniform Commercial Code to be interpreted and enforced under the law as written at the time the transaction was made.

In 1964, Toulan and Nagle entered into an oral contract for the purpose of obtaining an automobile franchise. Under the terms of the initial agreement, Toulan was to contribute $12,500 entitling him to a 25 percent interest with the understanding that within five years he would increase his interest to 50 percent. After some delay, the dealership opened on January 4, 1967. Toulan did not have the funds required for his investment, having exhausted his capital in living expenses in the interim. According to the testimony of Toulan at trial, when he told Nagle in January of 1967 that he would be unable to make his initial investment, Nagle told him to "get it in the sooner the better."[19]

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security interest is perfected at the time the debtor receives possession of the collateral or within 10 days thereafter.

16. 67 Wis. 2d 233, 226 N.W.2d 480 (1975).

17. WIS. STAT. § 401.110 (1973) provides in relevant part:

401.110 Effective date; provision for transition. (1) This code applies to transactions entered into and events occurring on and after July 1, 1965.

(a) Transactions validly entered into before July 1, 1965, and the rights, duties and interests flowing from them remain valid thereafter and may be terminated, completed, consummated or enforced as required or permitted by any statute amended or repealed by chapter 158, laws of 1963, as though such repeal or amendment had not occurred.

18. 67 Wis. 2d at 250, 226 N.W.2d at 489.

19. *Id.* at 244, 226 N.W.2d at 486.

In the summer of 1967, Toulan secured $5,000 and made his first purchase. The business required increased capitalization, which Nagle financed. As a result of these increases and Toulan's failure at that point to make any of the additionally required purchases, a rift developed. In December of 1967, Nagle proposed a written stock option agreement which would have amended the earlier oral agreement as to the amount of money required of Toulan to purchase the increased partnership interest. Toulan rejected the amendment and, in February of 1968 announced his intention to purchase 50 percent of the business at the price fixed by the earlier oral agreement. A meeting was scheduled to consumate the deal, but before the time arrived, Nagle fired Toulan and rejected Toulan's offer. Toulan commenced an action alleging a breach of contract and seeking one-half of the profits or one-half of the increased value of the corporation. A jury returned a verdict in favor of Toulan. Nagle moved for judgment notwithstanding the verdict on three grounds, two of which are pertinent to section 401.110.

Nagel first asserted that the agreement found by the jury in the special verdict to have been made in 1964 was an oral agreement upon which recovery could not be had under the Statute of Frauds. Toulan, while admitting that the agreement was oral, contended that there was sufficient part performance of the agreement to take it out of the Statute of Frauds. The parties conceded that as to the original agreement, the applicable Statute of Frauds was section 121.04 (1963).[20] Under an interpretation of that section found in *Conway v. Marachowsky*,[21] the court concluded that Toulan's efforts in establishing the dealership were sufficient under the doctrine of part performance to take the agreement out of the Statute of Frauds.

Nagel similarly contended that the jury answer to the special verdict finding that there had been an amendment to the oral agreement, such amendment allowing Toulan to delay his initial payment, was also invalid under the Statute of Frauds.

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20. WIS. STAT. § 121.04 (1963) provides in relevant part:

121.04 Statute of Frauds. (1) A contract to sell or a sale of any goods or choses in action of value of fifty dollars or upwards shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold or sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf.

21. 262 Wis. 540, 55 N.W.2d 909 (1952).

The argument as to the amendment was based on a different provision of the Statute of Frauds, such provision governed by the Uniform Commercial Code. Although no specific finding as to the exact date of the amendment was made by the jury, it was clear that it was subsequent to the effective date of the Code. Under the Code, no provision for a part performance rule was enacted "other than where delivery of the security has been accepted or payment has been made, and then only to the extent of the delivery or payment."[22] Thus, if the amendment were governed by the Code, Toulan's rights of enforcement would have been restricted.

Toulan countered by arguing that under section 401.110, the 1963 version of the Statute of Frauds, was the applicable provision governing the oral amendment, just as it had been the applicable provision governing the initial agreement. The court agreed, stating that:

> We are of the opinion, if an agreement can be terminated, completed, consummated or enforced under the provisions of the law applicable at the time of its formation, that it would be an unreasonable construction of the statute to hold that the agreement could not be so modified or amended as to provide for the same. The amendment of the original agreement is subject to the same statutory rules of part performance applicable to the original agreement.[23]

II. AGENCY: TORTIOUS INTERFERENCE WITH THE PRINCIPAL-AGENT RELATIONSHIP

It is well established in the law of agency that once the principal-agent relationship exists,[24] should the agent divert money intended for the principal's use and benefit to his own use and benefit, a cause of action arises between principal and agent for breach of duty.[25] *St. Francis Savings and Loan Association v. Hearthside Homes*[26] presented the tangential prob-

22. 67 Wis. 2d at 249, 226 N.W.2d at 489.

23. *Id.* at 250, 226 N.W.2d at 489.

24. A general statement that one party is an agent of another sufficiently alleges the existence of an agency relationship. Mercantile Contract Purchase Corp. v. Melnick, 47 Wis. 2d 580, 584, 177 N.W.2d 858, 860 (1970); Herro v. Wisconsin Federal Surplus Property Development Corp., 42 Wis. 2d 87, 104-05, 166 N.W.2d 433, 442-43 (1969).

25. Degner v. Moncel, 6 Wis. 2d 163, 167, 93 N.W.2d 857 (1959). *See also* RESTATEMENT (SECOND) OF AGENCY, §§ 71, 81, 89, 93, 161A, 164 and 171.

26. 65 Wis. 2d 74, 221 N.W.2d 840 (1974).

lem of whether a third party may also be liable for the agent's alleged breach of duty.

In *Hearthside*, the plaintiff savings and loan association sought a judgment of foreclosure and judicial sale of mortgaged real estate which secured a residential construction loan to the bankrupt defendant-borrower. The trustee of the bankrupt counterclaimed, alleging that from the proceeds of the loan to the defendant, plaintiff had paid $5,000 to the defendant's real estate agents who then used that money, intended for construction purposes, for their own personal use and benefit.

The counterclaim was based on three alternative theories: (1) negligence, (2) breach of contract, and (3) tortious interference with the principal-agent relationship. The trial court sustained plaintiff's demurrer to the counterclaim. The Wisconsin Supreme Court affirmed the decision, but after modifying a cause of action for tortious interference with the principal-agent relationship, remanded the case for amendment of the pleadings.

The supreme court had no difficulty in determining that the counterclaim failed to state a cause of action in negligence because there were no allegations that the payment of the loan by the plaintiff to the defendant's real estate agents was made with lack of due care or even that a duty of supervision existed after disbursement of the money. Similarly, no action for breach of contract existed, because that cause of action minimally requires that the pleading specifically allege the provision of the contract at issue and its breach by the defendant.[27] However, the counterclaim alleged that the Christiansens, Hearthside's real estate agents, as fiduciaries, violated a duty of undivided loyalty owed to Hearthside all to the knowledge, consent, and approval of plaintiff association. Thus, the important issue which remained was whether, under the allegations of the counterclaim, a third party — the plaintiff-association — could be liable for the agents' alleged breach of duty in using money loaned to the principal, Hearthside, and intended for construction purposes, for their own personal benefit.

The trial court had followed the 1926 ruling in *Coakley v. Degner*,[28] and held that no cause of action was stated for tor-

27. Peters v. Peters Auto Sales, Inc., 37 Wis. 2d 346, 350, 155 N.W.2d 85, 87 (1967). *See also* 17A C.J.S. *Contracts* §§ 553, 1029.

28. 191 Wis. 170, 210 N.W. 359 (1926).

tious interference with the principal-agent relationship. In *Coakley* the defendants were not liable for damages for lost goods when the plaintiff's truck driver in response to defendant's prodding crossed a frozen lake upon the defendant's assurances that it was safe. The defendants knew that the driver agent had been instructed by his principal not to drive on the ice. Intentionally inducing the breach was not enough to impose liability. The court in *Coakley* quoted the rule as first established in *Singer S.M. Co. v. Lang*[29] that:

> [o]ne is liable to respond in damages who maliciously induces the agent of another to betray the trust imposed in him by his principal for the purpose of securing some advantage to himself at the expense of the principal.[30]

The counterclaim clearly failed to meet the *Coakley* test because there was no allegation that the Association acted with malice or for profit. If anything, the association suffered in that the alleged misappropriation led, in part, to default upon the loans.

The Wisconsin Supreme Court overruled *Coakley* by adopting section 312 of Restatement (Second) of Agency which provides: "A person who, without being privileged to do so, intentionally causes or assists an agent to violate a duty to his principal is subject to liability to the principal."[31] Adoption of this section is consistent with the court's prior adoption of section 766 of the Restatement of Torts pertaining to tortious breach of contract.[32] The court reasoned that while the provisions were not identical,[33] they pertained to similar conduct,[34] and unlike the law under *Coakley* neither required a showing that the tortfeasor acted with malice for personal profit. Applying the law, the court concluded that the allegations of the counterclaim

29. 186 Wis. 530, 203 N.W. 399 (1925).

30. 191 Wis. at 172, 210 N.W. at 359.

31. RESTATEMENT (SECOND) OF AGENCY, § 312 (1957).

32. RESTATEMENT OF TORTS, § 766 (1939) which reads in part: "[o]ne who, without a privilege to do so, induces or otherwise purposely causes a third person not to (a) perform a contract with another, . . . is liable to the other for the harm caused thereby." *See* Lorenz v. Dreske, 62 Wis. 2d 273, 214 N.W.2d 73 (1974); Wisconsin Power and Light Co. v. Gerke, 20 Wis. 2d 181, 121 N.W.2d 912 (1963).

33. RESTATEMENT (SECOND) OF AGENCY § 312 (1957) only requires that the tortious intermeddler intentionally assist the breach while the RESTATEMENT OF TORTS § 766 (1939) requires that he actually cause the breach.

34. *See* RESTATEMENT (SECOND) OF AGENCY § 312 (1957), comment (a) and RESTATEMENT OF TORTS §§ 757-812 for the general principles involved.

had merit but failed to state with particularity a cause of action under section 312. The failure was based upon an absence of detail concerning the real estate agents' use of the money in breach of their principal-agent duties and concerning the association's assistance in such breach. Thus, the case was remanded for repleading.

III. CREDIT AGREEMENT TRANSACTIONS

Repercussions of the *State v. J.C. Penney Co.*[35] decision, which held that the one and one-half percent monthly service charge on retail revolving charge accounts constituted usury under Wisconsin Statutes section 138.05(1)(a) are still being experienced. In *Wiener v. J.C. Penney Co.*,[36] the court was faced with the sole issue of whether Wisconsin Statutes section 138.06(7),[37] which prohibits class actions by pre-October 8, 1970 credit sale usury victims, was constitutional.

Wiener presented eight cases consolidated on appeal with each action presenting one named plaintiff who claimed to sue for himself individually and for all other Wisconsin citizens who entered into credit agreements with the defendant. Usury violations were alleged, with an accounting and penalties for the six years prior to the bringing of this action being sought. The defendants demurred to the plaintiffs' right to maintain a class action, and in June, 1971, the trial court overruled demurrers to the class actions for penalties under the usury statute. Prior to this appeal, two additional subsections were added to section 138.06[38] and as a result of that legislative action, the

35. 45 Wis. 2d 125, 197 N.W.2d 125 (1970). *See* 54 MARQ. L. REV. 223 (1971) for an in-depth discussion.

36. 65 Wis. 2d 139, 222 N.W.2d 149 (1974).

37. WIS. STAT. § 138.06(6) and (7) (1971) read as follows:

(6) In connection with a sale of goods or services on credit or any forbearance arising therefrom prior to October 9, 1970, there shall be no allowance of penalties under this section for violation of s. 138.05, except as to those transactions on which an action has been reduced to a final judgment as of the effective date of this subsection (1972).

(7) Notwithstanding sub. (6), a seller shall, with respect to a transaction described in sub. (6), refund or credit the amount of interest, to the extent it exceeds the rate permitted by s. 138.05(1)(a), which was charged in violation of s. 138.05 and paid by a buyer since October 8, 1968, upon individual written demand therefor made on or before March 1, 1973, and signed by such buyer. A seller who fails within a reasonable time after such demand to make such refund or credit of excess interest shall be liable in an individual action in the amount equal to 3 times the amount thereof, together with reasonable attorney's fees.

38. WIS. STAT. § 138.06(6) and (7); Wis. Laws 1971, ch. 308 (effective May 11, 1972).

supreme court reversed the order overruling the demurrers and remanded the case for reconsideration.[39] The supreme court did not rule on the meaning of the new subsections but noted that the allowance of penalties was eliminated on its face. Because the legislature's intent in passing the new subsection could arguably affect this type of case and because the effect of the statute on class actions could not have been considered in the filed briefs, remand was proper. On remand the defendants interposed amended demurrers alleging that the new statute, section 138.06(7), deprived the plaintiffs of the right to maintain a class action. The demurrers were sustained, and the issue of the constitutionality of section 138.06(7) was framed.

Plaintiffs acknowledged that section 138.06(7) created two changes in the law with respect to persons who had charged usurious interest rates on transactions prior to October 8, 1970: (1) the measure of damages was changed to eliminate penalties, and (2) class actions were forbidden. However, they claimed that section 138.06(7) was unconstitutional as a denial of equal protection of the laws in violation of the fourteenth amendment to the United States Constitution[40] and article I, section 1 of the Wisconsin Constitution.[41] In addition they argued that law denied a remedy for a wrong in violation of article I, section 9 of the Wisconsin Constitution.[42] The basis for the violation of equal protection was the statute's effect in distinguishing the pre-*Penney* group in denying them the right to bring class actions available to all others having legal claims of various kinds, including post-*Penny* usury victims.

In affirming the trial court decision sustaining the demur-

39. Wiener v. J.C. Penney Co., 55 Wis. 2d 61, 197 N.W.2d 756 (1972).

40. The fourteenth amendment to the U.S. CONST. provides in part:
No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

41. ART. I. § 1, of the WISCONSIN CONSTITUTION provides:
All men are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed.

42. ART. I, § 9, of the WISCONSIN CONSTITUTION provides:
Every person is entitled to a certain remedy in the laws for all injuries, or wrong which he may receive in his person, property, or character; he ought to obtain justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws.

rers to the class actions, the supreme court established the standard of review for equal protection claims based on the following principles:

> (1) Only if a challenger can show that the classification is arbitrary and has no reasonable purpose or relationship to the facts or a justifiable and proper state policy will a legislative classification fall on the grounds of a denial of equal protection.[43]
>
> (2) [T]he classification made by the legislature is presumed to be valid unless the court can say that no state of facts can reasonably be conceived that would sustain it.[44]
>
> (3) [B]efore a statute will be held unconstitutional for violating these standards, the attacker must meet a very heavy burden of proof and persuasion.[45]

Additionally the court listed five other standards:

> (1) All classifications must be based upon substantial distinction which make one class really different from another.
> (2) The classifications adopted must be germane to the purpose of the law.
> (3) The classifications must not be based upon existing circumstances only. They must not be so constituted as to preclude additions to the numbers included within a class.
> (4) To whatever class a law may apply, it must apply equally to each member thereof.
>
> . . . .
>
> (5) The characteristics of each class should be so far different from those of other classes as to reasonably suggest at least the propriety, having regard to the public good, of substantially different legislation.[46]

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43. 65 Wis. 2d at 146, 222 N.W.2d at 153, *quoting* Simanco, Inc. v. Dept. of Revenue, 57 Wis. 2d 47, 57, 203 N.W.2d 648, 653 (1973).

44. *Id.* at 147, 222 N.W.2d at 153, *quoting* Country Motors v. Friendly Finance Corp. 13 Wis. 2d 475, 485, 109 N.W.2d 137, 142 (1961). For holdings that legislation regulating economic and fiscal affairs enjoys a presumption of constitutionality *see* Simanco, Inc. v. Dept. of Revenue, 57 Wis. 2d 47, 203 N.W.2d 648 (1973). Dandridge v. Williams, 397 U.S. 471 (1970); Vanden Broek v. Reitz, 53 Wis. 2d 87, 191 N.W.2d 913 (1971).

For holdings that classifications in usury statutes have been specifically accorded a presumption of constitutionality *see* Country Motors v. Friendly Finance Corp., 13 Wis. 2d 475, 485, 109 N.W.2d 137, 142 (1961), *quoting* State v. Neveau, 237 Wis. 85, 99, 294 N.W. 796, 803 (1941).

45. 65 Wis. 2d at 147, 222 N.W. 2d at 153.

46. *Id.*, *citing* State *ex rel.* LaFollette v. Reuter, 36 Wis. 2d 96, 111, 153 N.W.2d 49, 55 (1967) states: "[T]o declare an act of the legislature as to a classification violative of the equal protection clause, it is first necessary to prove that the legislature has abused its discretion beyond a reasonable doubt."

Applying these principles, the court reasoned that the statute could reasonably serve a legitimate public purpose by protecting the state economy, since the severity of penalty claims under the usury statute could be devastating to defendants both in terms of the ultimate judgment and the costs of litigation. The court premised this conclusion upon an examination of the history of section 138.06(7). It noted that the statute was passed at a special meeting of the legislature after the governor warned that the 1970 *Penney* decision exposed retailers across the state to potentially bankrupting liability from hundreds of thousands of penalty claims under the usury laws.[47]

The court found further support for its position from the special circumstances surrounding the passage of the bill which revealed a rational justification for the difference in treatment between usury claims and all other claims. These special circumstances are based on the fact that prior to the 1970 *Penney* decision the Wisconsin courts had never ruled on the validity of a revolving charge plan under the usury laws. The court ruled that under these circumstances the legislature might have reasonably concluded that pre-*Penney* retailers had acted in good faith and therefore should not be subject to severe penalties.

Adopting a parallel analysis the court found a rational justification for treating pre-*Penney* and post-*Penney* usury victims differently. It reasoned that after the *Penney* decision was announced, all retailers in the state were effectively put on notice that the usury laws applied to revolving charge accounts and that any further violations could not be considered in good faith. The court finally noted that reasonable classifications based on time have frequently been upheld in Wisconsin.[48]

The court's second major ruling was that section 138.06(7) was not a denial of a remedy for wrongs contrary to article I, section 9, of the Wisconsin Constitution. Section 138.06(7) pro-

47. *Id.* at 148, 222 N.W.2d at 154, quoting Journal of the Senate (Special Session, 1972), April 19, 1972, pp. 9, 10. The governor said in part: "There could be literally hundreds of small retailers in our state who are threatened with potential bankruptcy unless the legislature intervenes."

48. Jelinski v. Eggars, 34 Wis. 2d 85, 148 N.W.2d 750 (1967) (zoning ordinance constitutional which permits prior existing but prohibits future nonconforming uses); Estate of Bloomer, 2 Wis. 2d 623, 87 N.W.2d 531 (1958) (debtor not denied equal protection where statute of limitations protects him from one kind of claim but not another); Werlein v. Milwaukee Electric Ry. & Transport Co., 267 Wis. 392, 66 N.W.2d 185 (1954) (statutory classifications based upon time are generally recognized as valid).

vides that if upon written individual demand the retailer refuses to refund the excess, the claimant may sue for triple the amount plus reasonable attorney's fees. While it may not provide the exact remedy which the plaintiffs desired, it was a "certain remedy," conforming to the laws, and gave plaintiffs their "day in court" as required by the constitution.[49] The plaintiffs' complaint that the new statutory procedure was inadequate was not rejected since there was no evidence presented that plaintiffs availed themselves of this procedure.

While the rule in *Wiener* is not surprising in continuing the trend of limiting class actions generally or in supporting government policy which promotes and protects the interests of the state economy, it does raise some questions. First, in the governor's message urging passage of the bill,[50] he stated that literally hundreds of small retailers would be threatened with potential bankruptcy unless legislative intervention occurred. This was based on a study of thirty-two stores in twenty Wisconsin cities showing that each would face bankruptcy should the full penalty be exacted. Major points which might be raised relating to this foundation study are: (1) is it the small retail business which commonly uses retail charge accounts or is it a favored device of large retail outlets, and (2) what is the likelihood of any court exacting the full penalty in every case.

Secondly, the court utilized a good faith argument which is extremely subjective. The court stated that the parties were acting in good faith because they conformed to the laws as they existed, and when the laws change, the parties will then be put on notice that the same actions could not thereafter be in good faith. While this theory satisfies a good faith test in a narrow sense, it might be regarded differently if it were examined from the perspective of a large retailer who is attempting to keep his interest rates as high as possible for as long as possible through litigation intended only to prolong a favorable status quo. While the decision is founded on a principle of protecting the state economy, it seems an unusual kind of justice which is accomplished by protecting retail stores which have profited at the expense of Wisconsin citizens who were charged usurious rates of interest.

On the other hand, "usurious rates of interest" are strictly

49. *See* Metzger v. Department of Taxation, 35 Wis. 2d 119, 150 N.W.2d 431 (1967).
50. Journal of the Senate (Special Session, 1972), *supra* note 7.

defined by statute: today's usury is yesterday's acceptable, legal way of conducting business.

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CRIMINAL JUSTICE

An examination of the recent term of the Wisconsin Supreme Court, in the criminal justice field, verifies an observation made in this publication a year ago, that the court's treatment of defendant's rights had approached a degree of stability, and that the criminal justice system would settle into a temporary period of applications of those decisions without significant change in the court's characterization of the rights themselves.[1] In addition, the court has been more preoccupied with pre-conviction remedies than with post-conviction remedies. This shift is illustrated by a reduction in the number of cases construing the law of search and seizure, an area which has been a hot bed of activity in recent years. Despite this relative quietude, cases in the criminal justice field continue to constitute the vast majority of the court's written decisions and remains an ever changing area of the law.

I. PRE-TRIAL CONSIDERATIONS

Perhaps one of the most confusing and troublesome controversies in the law of search and seizure concerns the propriety of inventory searches of vehicles coming into the custody of the police after the driver has been arrested. In *State v. McDougal*,[2] the court addressed the obvious confusion existing in the law and arrived at a determinative decision.

The fact situation of *McDougal* was fairly typical: The defendant was stopped for a traffic violation, and a succession of extenuating circumstances resulted in his being taken to the

1. Term of Court, Criminal Justice, 58 Marq. L. Rev. 313, 317 (1975):

It appears that *Mabra* and *Robinson* are in part attempts to eliminate litigation on searches and seizures. The attempt may prove to be unsuccessful, because a possible result of the decisions will be merely to shift litigation to related areas of the criminal law. Now exposed to more search opportunities, defendants may more often and more vigorously dispute "probable cause" for their investigatory stopping and arrests. An arrest may be challenged as pretextual for the search, and disputes may arise as to the timeliness of a search vis-a-vis its justifying arrest. [citations omitted].

2. 68 Wis. 2d 399, 228 N.W.2d 671 (1975).