

tial market by excluding children thereby limits him from "speaking" his mind. The principle argued for by the plaintiff might apply as well to the movie-theater regulations excluding minors or minors-without-accompanying-adult, or the Federal Communication Commission "family hour" primetime policy of minimizing the incidence of sex and violence in television programming. Further, one must wonder, if the plaintiff was "speaking," what it was he was saying. "It has been well observed that [lewd and obscene] utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and mortality"¹¹²

For the distributor to characterize, as an illustration of his first amendment right of free speech, the commercial distribution of numerous publications he himself may not have read, is almost metaphorical. For insofar as the publications deal in any serious way with ideas, they might articulate views quite the contrary to those of the distributor. Such semantic license is not uncommon in areas as controversial and complicated as obscenity litigation, and, on balance, an ultimate determination on the substantive merits may well be better than dismissal on the threshold issue of standing. But the root lesson from the case may well be strategic: if counsel can persuade a court that his client should be allowed to wrap himself in someone else's first amendment cloak, he will be far better prepared to withstand the cold scrutiny of his business activities.

VI. Consumer Law

*Douglas J. Whaley**

During the survey period the major consumer law developments were statutory. The Congress was responsible for most of the activity, passing acts regulating sales warranties and credit billing and amending the Truth in Lending Act.

¹¹²Roth v. United States, 354 U.S. 476 (1957), *quoted with approval* in Miller v. California, 413 U.S. 1 (1973).

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A. *The Magnuson-Moss Warranty—Federal Trade Commission Improvement Act*¹

President Ford signed into law the Magnuson-Moss Act on January 4, 1975. The Act, which went into effect on July 4, 1975, applies only to products manufactured after that date.² It is divided into two nonrelated parts: Title I dealing with warranties, and Title II dealing with the jurisdiction and authority of the Federal Trade Commission (FTC). This article will discuss only Title I.

Generally, the Magnuson-Moss Act provides that for all products sold to consumers and covered by any *written warranty*,³ the written warranty must meet certain minimum FTC standards⁴ “so as not to mislead the reasonable, average consumer” if the product

¹The Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C.A. §§ 2301-12 (Supp. 1, 1975).

²*Id.* § 2312(a). The FTC has declined, on the basis of lack of authority, to extend the Act's effective date. FED. TRADE COMM'N NEWS SUM. No. 24, at 3 (1975).

³A “written warranty” is defined as:

(A) any written affirmation of fact or written promise made in connection with the sale of a consumer product by a supplier to a buyer which relates to the nature of the material or workmanship and affirms or promises that such material or workmanship is defect free or will meet a specified level of performance over a specified period of time, or

(B) any undertaking in writing in connection with the sale by a supplier of a consumer product to refund, repair, replace, or take other remedial action with respect to such product in the event that such product fails to meet the specifications set forth in the undertaking,

which written affirmation, promise, or undertaking becomes part of the basis of the bargain between a supplier and a buyer for purposes other than resale of such product.

15 U.S.C.A. § 2301(6) (Supp. 1, 1975).

⁴*Id.* § 3202(b) (1) (B). The Act provides the FTC with guidelines for the formulation of its supplementing rules, stating that the rules *may* require the inclusion of the following as part of the written warranty:

(1) The clear identification of the names and addresses of the warrantors.

(2) The identity of the party or parties to whom the warranty is extended.

(3) The products or parts covered.

(4) A statement of what the warrantor will do in the event of a defect, malfunction, or failure to conform with such written warranty—at whose expense—and for what period of time.

(5) A statement of what the consumer must do and expenses he must bear.

(6) Exceptions and exclusions from the terms of the warranty.

(7) The step-by-step procedure which the consumer should take in order to obtain performance of any obligation under the warranty,

costs the consumer more than \$5.⁵ In addition the warranty must be conspicuously designated as either a "full (statement of time

including the identification of any person or class of persons authorized to perform the obligations set forth in the warranty.

(8) Information respecting the availability of any informal dispute settlement procedure offered by the warrantor and a recital, where the warranty so provides, that the purchaser may be required to resort to such procedure before pursuing any legal remedies in the courts.

(9) A brief, general description of the legal remedies available to the consumer.

(10) The time at which the warrantor will perform any obligations under the warranty.

(11) The period of time within which, after notice of a defect, malfunction, or failure to conform with the warranty, the warrantor will perform any obligations under the warranty.

(12) The characteristics or properties of the products, or parts thereof, that are not covered by the warranty.

(13) The elements of the warranty in words or phrases which would not mislead a reasonable, average consumer as to the nature or scope of the warranty.

Id. § 2302(a).

On July 15, 1975, the FTC issued three proposed rules. 40 Fed. Reg. 29,892-94 (1975). The proposed rules deal with (1) disclosure of written warranty terms, *id.* part 701 [hereinafter cited and referred to as Proposed Warranty Disclosure Rule]; (2) pre-sale availability of written warranty terms, *id.* part 702 [hereinafter cited and referred to as Proposed Pre-Sale Availability Rule]; and (3) informal dispute settlement procedures, *id.* part 703 [hereinafter cited and referred to as Proposed Settlement Procedures Rule]. The Proposed Warranty Disclosure Rule incorporates each term suggested by the Act, as listed above, with elaboration on some terms. Proposed Warranty Disclosure Rule, § 701.3. Subsection 701.3(l) represents the FTC's response to item (9) listed above. A warrantor, by the proposed rule, must re-print one of the following statements in his warranty:

This warranty gives you specific legal rights. You also have implied warranty rights. In the event of a problem with warranty service or performance, you may be able to go to a small claims court, a State court, or a Federal district court.

or

This warranty gives you specific legal rights. You also have implied warranty rights, including an implied warranty of merchantability, which means that your product must be fit for the ordinary purposes for which such goods are used. In the event of a problem with warranty service or performance, you may be able to go to a small claims court, a State court, or a Federal district court.

Subsection 701.3(h) allows the warrantor to provide either a step-by-step explanation of the procedure for obtaining performance of a warranty obligation or a toll-free telephone number which the consumer can use to ascertain such procedure. If terms such as "lifetime" are used to indicate the duration of a warranty, subsection 701.3(m) provides that there must be a "clear and conspicuous disclosure of the life referred to." It seems obvious that the prod-

duration) warranty” or a “limited warranty”⁶ if the product costs the consumer more than \$10.⁷ A “full (statement of time duration) warranty”—for example, a “full one year warranty” — must meet the minimum federal standards of the Magnuson-Moss Act⁸

uct life is the life referred to, but it may be that the FTC means to require more than this, possibly a specific minimum number of years.

The Proposed Warranty Disclosure Rule requires that warranties clearly disclose the purpose of cards which are to be returned by the consumer subsequent to purchase. If return of the card is a condition precedent to warranty coverage, this is to be clearly disclosed by the warrantor. *Id.* § 701.4. If the card's return is not required for coverage, its purpose must be disclosed. *Id.*

Given the objective of avoiding the misleading of consumers, subsection 2302(b) (1) (A) of the Act mandates that the FTC prescribe rules requiring that the terms of any written warranty be made available to the consumer prior to the sale of the product to him. The FTC has proposed such rules. Proposed Pre-Sale Availability Rule pt. 702. Under the proposed rule, it is the duty of the seller to maintain a binder, notebook, or similar system, in each department in which a consumer product which is warranted is sold. *Id.* § 702.3(a). Such binder must be entitled “WARRANTIES”, in boldface type on the outside cover, and it must be accompanied by the following statement: “You may obtain a copy of any of the warranties contained in this book from the warrantor.” *Id.* § 702.3(a) (1) (i). The seller is required to request copies of warranties from the warrantor, together with an index and periodic supplements. *Id.* §§ 702.3(a) (1) (ii), (2). Such binders must be made available to the consumer upon request. *Id.* § 702.3(a) (3). It is the duty of the warrantor to (1) provide sellers with copies of written warranties, *id.* § 702.3(b) (2); (2) provide a copy of any warranty requested by a consumer, *id.* § 702.3(b) (1); and (3) attach to the product and print on the package or container the following statements: “The retailer has a copy of the complete warranty on this product. Ask to see it.” *Id.* § 702.3(b) (3).

Under the proposed rule, any catalog seller must clearly and conspicuously disclose, on the same page as the description of the product, any warranty designation and the address at which a free copy of the written warranty may be obtained, and such a copy must be provided. *Id.* § 702.3(c). Similarly, any mail-order seller or anyone advertising with instructions to order is required to disclose in his solicitation any warranty designation and the address at which a free copy of any written warranty may be obtained, and such a copy must be provided upon request. *Id.* § 702.3(d). Door-to-door sellers are required to present the consumer with a copy of any written warranty prior to any sale's transaction, and the consumer may keep the copy even if no purchase was made. *Id.* § 702.3(e).

⁵Warranties provided by the manufacturer for products which actually cost the consumer \$5 or less need not comply with the rules governing contents of warranties. 15 U.S.C.A. § 2302(e) (Supp. 1, 1975).

⁶*Id.* § 2303(a).

⁷*Id.* § 2303(d).

⁸*Id.* § 2303(a). The statutory requirements for a “full” warranty are as follows:

- (1) such warrantor must as a minimum remedy such consumer product within a reasonable time and without charge, in the case of a defect, malfunction, or failure to conform with such written warranty;

and any FTC rules supplementing the Act. Any written warranty not meeting these minimum standards is deemed a "limited warranty" and must be "conspicuously designated" as such.⁹

The idea, of course, is that once consumers become aware of the difference between the two types of warranties, they will tend to buy products with the protections afforded by the "full" designation. Thus manufacturers which give only a "limited" warranty or give no written warranty at all¹⁰ will be at a competitive disadvantage.

The FTC, which has the duty of drawing up rules to supple-

(2) notwithstanding section 2308(b) of this title [allowing limitation of the duration of implied warranties; *see* note 13 *infra*], such warrantor may not impose any limitation on the duration of any implied warranty on the product;

(3) such warrantor may not exclude or limit consequential damages for breach of any written or implied warranty on such product, unless such exclusion or limitation conspicuously appears on the face of the warranty; and

(4) if the product (or a component part thereof) contains a defect or malfunction after a reasonable number of attempts by the warrantor to remedy defects or malfunctions in such product, such warrantor must permit the consumer to elect either a refund for, or replacement without charge of, such products or part (as the case may be). The Commission may by rule specify for purposes of this paragraph, what constitutes a reasonable number of attempts to remedy particular kinds of defects or malfunctions under different circumstances. If the warrantor replaces a component part of a consumer product, such replacement shall include installing the part in the product without charge.

Id. § 2304(a). As of the date of this writing, the FTC had not issued proposed rules regarding duties or categorization of duties inherent in section 2304(a), though it has that authority pursuant to section 2304(b) (3) of the Act.

⁹*Id.* § 2303(a) (2).

¹⁰A supplier can avoid the matter completely if he has given no written warranty and has effectively disclaimed the implied warranties in a manner consistent with sections 2-316(2) and 2-316(3) of the Uniform Commercial Code (UCC). *Cf.* *Woodruff v. Clark County Farm Bureau Cooperative*, 286 N.E.2d 188 (Ind. Ct. App. 1972) (implied warranty disclaimers are not favored in Indiana and must be clear and conspicuous or the warranty survives). If the implied UCC warranties were not effectively disclaimed, suit for their breach could be brought under the Magnuson-Moss Act, even though no written warranty was given. 15 U.S.C.A. § 2310(d) (Supp. 1, 1975). The advantage of a federal suit, as opposed to one under the UCC, is the recovery of attorneys' fees. *Id.* § 2310(d) (2).

ment the Magnuson-Moss Act,¹¹ cannot require the giving of a written warranty.¹² But if the supplier of the product does elect to give a written warranty, implied warranties created by state law may not be disclaimed.¹³ This constitutes a major development in the law of warranties. It reflects congressional belief that it is basically unfair for a manufacturer to give express warranties of limited effectiveness while at the same time disclaiming all implied warranties. For example, an automobile manufacturer gives a “warranty” that is effective only if the consumer returns the defective vehicle to the factory within five days of its purchase, but disclaims all implied warranties. If the vehicle self-destructs on the sixth day, the consumer is helpless. The Magnuson-Moss Act validates the consumer’s usual belief—a belief wrong under prior law—that goods at the least are fit for their ordinary purpose.¹⁴

Under the Magnuson-Moss Act consumers injured by breach of a written warranty, an implied warranty, or a service contract may sue individually or as part of a class and may recover actual damages plus costs and reasonable attorneys’ fees.¹⁵ There are, however, several prerequisites to suit. The consumer must give the

¹¹The FTC is required or allowed in provisions throughout the Magnuson-Moss Act to prescribe rules supplementing the Act. *See, e.g.*, 15 U.S.C.A. § 2302(b)(1)(A) (Supp. 1, 1975) (availability of terms to consumer); *id.* § 2303(c) (exemptions from designation of written warranties); *id.* § 2306(a) (manner and form for disclosure of terms and conditions of service contracts).

¹²“Nothing in this chapter . . . shall be deemed to authorize the Commission . . . to require that a consumer product or any of its components be warranted.” *Id.* § 2302(b)(2).

¹³*Id.* § 2308(c). The implied warranties may, however, be limited in duration if a “full” warranty is not given. *Id.* § 2308(b). For example, if a manufacturer gave a “full 30 day” written warranty, he could not exclude the UCC implied warranties of merchantability or fitness for a particular purpose. UNIFORM COMMERCIAL CODE §§ 2-314, -315. These implied warranties would last for a reasonable time, which could exceed 30 days. If, on the other hand, a manufacturer gave only a “limited” written warranty, he could limit the duration of the implied warranties to the same duration as the written warranty, providing this limitation is conscionable and conspicuous. 15 U.S.C.A. § 2308(b) (Supp. 1, 1975).

¹⁴Fitness for an *ordinary* purpose is part of the UCC’s implied warranty of merchantability found in section 2-314(2)(c); fitness for a *particular* purpose is an implied warranty described in UCC section 2-315. Other UCC implied warranties can arise from common understanding or past dealings between the parties. UNIFORM COMMERCIAL CODE § 2-314(3).

¹⁵15 U.S.C.A. § 2310(d)(2) (Supp. 1, 1975). The federal courts have jurisdiction only if the amount in controversy exceeds \$50,000, the amount in controversy for each plaintiff exceeds \$25, and there are at least 100 plaintiffs if it is a class action. *Id.* § 2310(d)(3)(B).

warrantor notice of the defect¹⁶ if the warranty is so conditioned. The consumer must allow the warrantor a reasonable opportunity to "cure" the defect.¹⁷ If the product proves to be a "lemon" and irreparable, this requirement is satisfied after a reasonable number of repair attempts.¹⁸ If the warrantor has established a fair informal settlement procedure, in compliance with FTC rules involving participation by independent or governmental agencies,¹⁹ and has made it clear as part of the written warranty that use of the

¹⁶*Id.* § 2304(b) (1). The UCC requires that notice always be given within a reasonable time after the breach of warranty should have been discovered or all UCC actions are barred. UNIFORM COMMERCIAL CODE § 2-607(3).

¹⁷15 U.S.C.A. § 2310(e) (Supp. 1, 1975). There is a similar requirement in the UCC. UNIFORM COMMERCIAL CODE § 2-508.

¹⁸15 U.S.C.A. § 2304(a) (4) (Supp. 1, 1975). Congress called this provision the "anti-lemon" rule. See H.R. REP. NO. 93-1606, 93d Cong., 2d Sess. 24 (1974).

¹⁹Section 2301(a) (2) of the Act directs the FTC to prescribe rules setting forth minimum requirements for any informal dispute settlement procedure which is incorporated into the terms of a written warranty. It does not specify form, procedures, or requirements which the FTC must prescribe. The FTC has responded by proposing a rule which would permit widely varying procedures, allowing warrantors to establish mechanisms best suited to their situation. Proposed Settlement Procedures Rule, pt. 703. The proposed rule includes detailed requirements for member (those deciding disputes) qualifications, deadlines for resolution of disputes, recordkeeping, and audits.

Any warrantor choosing to establish an informal dispute settlement mechanism must provide a statement of the availability of the mechanism, its name and address or telephone number, the type of information needed to resolve a dispute, and any time limits. *Id.* § 703.2. If a warrantor cannot resolve a dispute directly, it must immediately refer the problem to the mechanism, together with all required information, and must comply with any requirements of the mechanism to fairly and expeditiously resolve disputes. *Id.* §§ 703.2(e)-(h). The Proposed Settlement Procedures Rule provides that the mechanism should be funded and staffed in such a way as to provide fair resolution for all disputes and that it must be free to consumers. *Id.* § 703.3. Upon receipt of the dispute, the mechanism must notify the parties and provide them with a copy of operating procedures and time limits, *id.* § 703.5(b), and then must investigate the situation. *Id.* § 703.5(c). If a settlement is not reached, the mechanism must render a decision within 40 days of notice of the dispute, and the decision must include remedies deemed appropriate and allowance of a reasonable time for performance. *Id.* § 703.5(e). The decisions of the settlement mechanism are not legally binding, but the warrantor is required to act in good faith. *Id.* § 703.5(j).

The Proposed Settlement Procedures Rule requires that the mechanism maintain thorough records of each dispute, consisting of at least names and addresses of parties, the product involved, the basic facts, a statement of the decision, all evidence, and a statement of the warrantor's intended action. *Id.* § 703.6. The records must be kept for at least 4 years after the decision, and certain statistics must be compiled on such recorded disputes and kept. *Id.* §§ 703.6(c), -(d). These records must be available for required yearly

procedure is a prerequisite to suit, the consumer must seek redress first through the informal settlement procedure.²⁰ Finally, a consumer cannot sue unless the product can be returned free of liens and encumbrances²¹ and with no damage other than that caused by the warranty defects.²²

The Magnuson-Moss Act contains some other interesting measures. One section prohibits the use of a "tie-in," under which a warrantor attempts to condition his warranty on the use of other products or services provided by him;²³ another section provides for regulation of the terms of service contracts;²⁴ and a third section requires that the FTC develop rules concerning warranty practices in the sale of used motor vehicles.²⁵ The total impact of the Magnuson-Moss Act will remain unknown until the FTC promulgates additional rules necessary to implement many of the Act's provisions, but even without these rules, which likely will be pro-consumer in nature, the Magnuson-Moss Act already has forged a major link in the chain of federal statutes Congress has created in recent years to protect the consumer.²⁶

B. *The Fair Credit Billing Act*

Congress passed the Fair Credit Billing Act²⁷ at the same time

audits. *Id.* § 703.7. Statistics are to be available to any person, but specific records of disputes must be kept confidential. *Id.* § 703.8.

²⁰15 U.S.C.A. § 2310(a) (Supp. 1, 1975).

²¹*Id.* § 2304(b) (2).

²²*Id.* § 2304(c). The "failure to provide reasonable and necessary maintenance" is classified as an "unreasonable use," which also would allow the warrantor to avoid remedying a defect, malfunction, or failure of the warranted consumer product. *Id.*

²³*Id.* § 2302(c). The FTC may grant waivers of this rule in appropriate cases. *Id.*

²⁴*Id.* § 2306. This section allows the FTC to develop disclosure rules for service contracts. "Service contracts" are written contracts to perform repair or maintenance work on a consumer product for a specified period of time. *Id.* § 2301(8).

²⁵*Id.* § 2309(b).

²⁶*E.g.*, the Truth in Lending Act, 15 U.S.C. §§ 1601-65 (1970), Regulation Z, 12 C.F.R. pt. 226 (1975); the Federal Garnishment Act, 15 U.S.C. §§ 1671-77 (1970); the Interstate Land Sales Full Disclosure Act, 15 U.S.C. §§ 1701-20 (1970), 24 C.F.R. pts. 1700, -10, -15, -20 (1975); the Fair Credit Reporting Act, 15 U.S.C. §§ 1681-81t (1970); the Federal Odometer Law, 15 U.S.C. §§ 1981-91 (Supp. II, 1972), 49 C.F.R. pt. 590 (1975); the Consumer Product Safety Act, 15 U.S.C. §§ 2051-81 (Supp. II, 1972).

²⁷The Fair Credit Billing Act, 15 U.S.C.A. §§ 1601-08, 1610, 1631, 1632, 1637, 1666-66j (Supp. 1, 1975). The Federal Reserve Board, pursuant to the statute, has promulgated amendments to Regulation Z to implement sections 306 to 308 of the Act. §§ 226.1-14, 40 Fed. Reg. 19,489-95 (1975), *as revised* 40 Fed. Reg. 32,350-60 (1975) [hereinafter cited as Reg. Z].

as it passed minor amendments to the Truth in Lending Act²⁶ and enacted the Equal Credit Opportunity Act,²⁹ which prohibits sex discrimination in the granting of credit. All of these statutes went into effect on October 28, 1975. The Fair Credit Billing Act deals with several consumer credit problems left unresolved by prior statutes: (1) billing disputes, (2) bank setoffs, and (3) credit card practices.

1. Billing Disputes

Under the Fair Credit Billing Act, when a customer discovers an error in his charge account or credit card bill and provides written notification of the error to the creditor within 60 days of receipt of the bill, the creditor must acknowledge the complaint in writing within 30 days³⁰ and investigate and resolve the dispute within the lesser of two billing cycles or 90 days.³¹ In the interim the creditor may not take action to collect the disputed amount,³²

²⁶15 U.S.C. §§ 1601-65 (1970), as amended 15 U.S.C.A. (Supp. 1, 1975). The following comprise the more important amendments: New credit advertising disclosure requirements, 15 U.S.C.A. § 1665a (Supp. 1, 1975); a three year statute of limitations for the right of rescission when a security interest is taken in the consumer's home, *id.* § 1635(f); an expansion of the Act's regulation of credit cards, *id.* § 1644; a drastic change in the civil liability section to provide that the injured consumer may recover actual damages, punitive damages in the amount of double the finance charge (with a \$100 minimum and \$1,000 maximum), and costs and attorneys' fees, *id.* §§ 1640(a)-(c), (f)-(h). For the first time the Truth in Lending Act speaks directly to the conditions under which class actions may be allowed, stating, for instance, that the total recovery in a class action now may not be more than the lesser of \$100,000 or 1 percent of the net worth of the creditor-defendant. *Id.* § 1640(a)(2)(B).

²⁹The Equal Credit Opportunity Act, 15 U.S.C.A. §§ 1691-91e (Supp. 1, 1975). The Federal Reserve Board is given the authority to regulate credit discrimination on the basis of sex, *id.* § 1691b, and has issued proposed regulations toward this end. *See* 40 Fed. Reg. 18,183-87 (1975). Consideration of the sex of the applicant in granting or denying credit is unlawful and gives rise to a civil action for actual damages, punitive damages of up to \$10,000, and costs, including reasonable attorneys' fees. 15 U.S.C.A. § 1691e (Supp. 1, 1975).

³⁰15 U.S.C.A. § 1666(a) (Supp. 1, 1975). If the creditor has so stipulated in the Fair Credit Billing Act disclosure form, which must be sent to all customers of the creditor semiannually, *id.* § 1637(a)(8), the customer must send a separate written complaint notice, rather than simply write the complaint on the bill's payment stub. *Id.* § 1666(a). Many creditors are likely to impose such a separate writing requirement if the returning payment stubs are routinely fed into a computer without examination.

³¹*Id.* § 1666(a)(3)(B).

³²*Id.* He may not sue, for instance, or close the account, or threaten any retaliatory action. Within limitations, however, the creditor is not prohibited from sending statements of account to the customer during that period. *Id.* § 1666(c).

impose a finance charge on it,³³ or include it in a credit report to a third party.³⁴ After making a good faith investigation,³⁵ the creditor may adjust the amount or not adjust it as he likes, but he must give the customer at least 10 more days in which to pay.³⁶ The creditor need not reinvestigate if the customer complains of the same problem.³⁷ But if the creditor thereafter gives a credit report on the matter to a third person, he must indicate in the report that the customer still disputes the charge and must notify the customer of the name and address of each party to whom the credit report was sent.³⁸ A creditor violating these provisions forfeits the amount in dispute not exceeding \$50.³⁹ He may also be liable for the usual Truth in Lending Act civil penalties.⁴⁰ The customer must be given semiannual notice of all these rights substantially in the form set forth by the Federal Reserve Board.⁴¹

If the creditor has agreed to give the customer a non-interest-bearing grace period in which to pay, the bill must be sent out at least 2 weeks before the date on which the finance charge begins to accrue.⁴² This should end the maddening experience of receiving on June 18 a bill that states it must be paid by June 15 to avoid the imposition of a finance charge. The creditor also may be required

³³Reg. Z, § 226.14(b) (1). If the dispute is resolved in his favor, however, the creditor may impose a finance charge or late payment charge to the extent of the amount actually owed. *Id.*

³⁴15 U.S.C.A. § 1666a(a) (Supp. 1, 1975). If the customer is permitting a bank to pay his credit card bills by automatically deducting the amount owed from his checking account, he may stop the disputed bill from being paid by giving the bank 16 days' written notice. Reg. Z, § 226.14(c) (1).

³⁵The creditor must make a written response to the customer's complaint explaining the statement and, if the customer so requests, documenting all charges. 15 U.S.C.A. § 1666(a) (3) (B) (Supp. 1, 1975). If the customer claims that he did not receive an item shown on the statement or that the merchant honoring the credit card made an incorrect report to the card issuer, the creditor must look into the matter and give the customer a written explanation of the investigatory steps taken. Reg. Z, § 226.14(a) (2) (iii).

³⁶Reg. Z, § 226.14(e) (1).

³⁷15 U.S.C.A. § 1666(a) (Supp. 1, 1975).

³⁸*Id.* § 1666a(b).

³⁹*Id.* § 1666(e).

⁴⁰*Id.* § 1640; Reg. Z, § 226.14(f) (2). See 12 U.S.C.A. § 1640 (Supp. 1, 1975), amending 12 U.S.C. § 1640 (1970). Section 1640 is discussed in note 28 *supra*.

⁴¹Reg. Z, § 226.7(d). The Federal Reserve Board has provided a model statement of notice, the text of which must substantially be contained in the notice form of the creditor. *Id.* § 226.7(a) (9). All bills must contain a new "Send Inquiries To:" statement. *Id.* § 226.7(b) (x).

⁴²15 U.S.C.A. § 1666b(a) (Supp. 1, 1975). But this requirement does not control if the creditor is prevented from timely mailing "because of an act of God, war, natural disaster, strike, or other excusable or justifiable cause, as determined under regulations of the Board." *Id.* § 1666b(b).

to credit all payments on the date of receipt so that the customer does not incur extra finance charges.⁴³ Merchants who honor bank credit cards must report to the card issuer all items returned within 5 business days of the return.⁴⁴

2. Bank Setoffs

In the latter part of the 18th century, there developed a common law lien by which a bank could, without notice, unilaterally debit the account of a depositor in order to pay a debt owed to the bank. This right, known to lawyers as "setoff" and to bankers as "offset,"⁴⁵ has often been used by a credit card issuing bank to dip into the checking account of a cardholder/depositor to settle credit card debts that the customer for some reason had refused to pay. The Fair Credit Billing Act now provides that a card issuer may not exercise the right of setoff in consumer credit transactions unless it has obtained a court order or it actually has contracted in writing with the customer to pay his credit card bills automatically on a regular basis.⁴⁶ Even then, in the event of a dispute, the customer can stop the setoff by giving the bank 16 days' written notice to that effect.⁴⁷

3. Credit Cards⁴⁸

The Fair Credit Billing Act deals with several disparate credit

⁴³Reg. Z, § 226.7(g). The creditor must credit the customer's account for any overpayment or refund the excess amount over the total new balance within 5 business days of receipt of payment. *Id.* § 226.7(h) (1).

⁴⁴*Id.* § 226.13(k) (1). The card issuer must then credit the account within 3 business days of the day the merchant's notice is received. *Id.* § 226.13(k) (2).

⁴⁵The bankers appear to have won this logomachy: the Fair Credit Billing Act calls it "offset." 15 U.S.C.A. § 1666h (Supp. 1, 1975). For pre-Act discussions of the common law lien see Note, *Banking Setoff: A Study in Commercial Obsolescence*, 23 HASTINGS L.J. 1585 (1972); Note, *Bank Credit Cards and the Right of Setoff*, 26 S.C.L. REV. 89 (1974).

⁴⁶15 U.S.C.A. § 1666h(a)(1) (Supp. 1, 1975); Reg. Z, § 226.13(j).

⁴⁷Reg. Z, § 226.14(c) (1). If the customer misses the 16-day notice requirement, he still may dispute the amount he believes to be in error within 60 days of mailing or delivery of the erroneous periodic statement. *Id.* § 226.14(c) (2).

⁴⁸The new amendments to the Truth in Lending Act provisions on credit cards, 15 U.S.C.A. §§ 1644-45 (Supp. 1, 1975), supplement the extensive regulation of the area already provided by the Act, 15 U.S.C. §§ 1642-44 (1970), and Regulation Z, 12 C.F.R. § 226.13 (1975), which, among other things, prohibit the sending of unsolicited credit cards and limit the cardholder's maximum liability for the unauthorized use of the card to \$50. This protection now extends to business users as well as to consumers. 15 U.S.C.A. § 1645 (Supp. 1, 1975).

card matters, including cash discounts, tie-ins, and the assertion by the customer of defenses against the bank.

Merchants honoring bank credit cards sell the resulting sales slips (drafts) to the bank at a discount from their face value that ranges from 3 to 8 percent.⁴⁹ Some consumers have sought to take advantage of this fact by bargaining with merchants over the cash price, offering to pay cash with a lesser discount than given by the bank. Some merchants accept these offers,⁵⁰ thereby creating a truth in lending dilemma for themselves. By acknowledging that the cash price is inflated to cover the discount, the merchants in effect admit that part of the finance charge is hidden in the cash price—a fact not disclosed by the bank's truth in lending statement.⁵¹ Under the Fair Credit Billing Act, the card issuer is forbidden to prohibit merchants from offering this discount to consumers;⁵² and the discounted amount will not be deemed a "finance charge" if the amount is not more than 5 percent, the discount is available to all prospective buyers, and this availability is posted on signs at each public entrance and sales point in the merchant's establishment.⁵³

A card-issuing bank may not require merchants who wish to honor the card to sign up for other services offered by the bank.⁵⁴ For instance, a merchant wishing to honor a bank credit card may not want or need a checking account with the issuing bank. Under the anti-tie-in section, the bank may not impose a mandatory checking account requirement as a condition to the merchant's participation in the credit card plan.

The customer who buys goods with a bank credit card often will get into disputes with the merchant. If the goods do not per-

⁴⁹The merchants prefer to bear this discount loss to having to set up their own credit card system with its attendant problems. In addition, participation in the bank's credit card plan should mean considerable extra business, which in turn makes up for the discounted amount.

⁵⁰See 39 CONSUMER REP. 432 (1974). Consumers Union filed suit against the American Express Company when the latter refused to permit its card-honoring merchants to give the cash discount to the customer. The matter was settled, with American Express acceding. How truth in lending compliance is to be obtained was not explained.

⁵¹The bank's failure to disclose this information may not create a truth in lending violation if it can be shown that the bank was not informed that the merchant was offering a cash discount directly to consumers. See, e.g., *White v. Central Charge Serv.*, 285 A.2d 305 (D.C. Ct. App. 1971), *cert. denied*, 409 U.S. 895 (1972).

⁵²15 U.S.C.A. § 1666f(a) (Supp. 1, 1975).

⁵³*Id.* § 1666f(b); Reg. Z, §§ 226.4(i)(1)(i)-(ii). The regulation also requires that advertisements and other solicitations mention the cash discount if payment by credit card is possible. *Id.* § 226.4(i)(1)(iii).

⁵⁴15 U.S.C.A. § 1666g (Supp. 1, 1975).

form as warranted but the merchant refuses to remedy the problem to the satisfaction of the customer, the customer may wish to get the bank involved by balking at paying the credit card bill when sent by the bank. Prior to the Fair Credit Billing Act, the consumer typically had to pay the bank, since the contract the consumer signed at the time the card was issued by the bank likely contained a clause providing that such problems had to be settled between the consumer and merchant.⁵⁵ The consumer now is permitted to raise his disputes with the merchant against the bank if he first has tried to settle with the merchant, the amount of the initial transaction exceeds \$50, and the transaction took place in the consumer's state or within 100 miles of his mailing address.⁵⁶ The last two limitations do not apply if the card issuer has a close connection with the merchant—for example, an oil company and its local service stations—or if the card issuer has permitted use of the card to be advertised in a mail solicitation.⁵⁷

C. State Law Changes

A significant amendment to Indiana's version of the Uniform Commercial Code allows prevailing plaintiffs in fraud suits involving the sale of goods to recover attorneys' fees.⁵⁸ Another new stat-

⁵⁵In effect, this is a contractual agreement not to assert defenses against an assignee, made with the assignee itself. The Uniform Consumer Credit Code (UCCC) regulates the agreement by a buyer or a lessee not to assert defenses arising from a consumer credit sale or consumer lease. IND. CODE § 24-4.5-2-404 (Burns 1974). However, the UCCC expressly excludes from the definition of "consumer credit sale" "a sale in which the seller allows the buyer to purchase goods or services pursuant to a lender credit card or similar arrangement." *Id.* § 24-4.5-2-104(2)(a). Thus the UCCC does not apply to the assertion of defenses by the customer against the issuer of a bank credit card.

⁵⁶15 U.S.C.A. § 1666i (Supp. 1, 1975). The reason for the territorial limitation is that most of the major bank credit cards are issued by local banks in the cardholder's neighborhood, while the cards are honored nationwide. If the cardholder on vacation in Florida buys shoddy goods with the card, it is considered unfair to require the bank to straighten out the long distance problem caused by the cardholder's peregrinations.

⁵⁷*Id.* § 1666i(a). The defenses which may be asserted by the cardholder do not include tort claims. *Id.*

⁵⁸

Remedies for material misrepresentation or fraud include all remedies available under [IND. CODE §§ 26-1-2-101 to -705 (Burns 1974)] for nonfraudulent breach. In all suits based on fraud or material misrepresentation, if the plaintiff recovers judgment in any amount, he shall also be entitled to recover reasonable attorney fees which shall be entered by the court trying the suit as part of the judgment in that suit. Neither rescission or a claim for rescission of the

ute amends the Indiana Uniform Consumer Credit Code (UCCC) to make it clear that closing costs are not part of the finance charge in consumer loans,⁵⁹ a point of some confusion in the original UCCC. The 1975 General Assembly also amended the UCCC provision dealing with wage assignments.⁶⁰

*Vernon Fire & Casualty Insurance Co. v. Sharp*⁶¹ and *Rex Insurance Co. v. Baldwin*⁶² are the decisions during the survey period of significance to consumers. In both cases the First District Court of Appeals, ignoring language of its own decisions from as recently as 1973,⁶³ upheld awards of punitive damages in breach of contract actions arising from the bad faith failure of insurance companies to honor claims.⁶⁴ In *Vernon* the court held that punitive damages are appropriate "where the conduct of the wrongdoer indicates a heedless disregard of the consequences, malice, gross fraud, or oppressive conduct."⁶⁵ The *Vernon* decision already has received national recognition and has implications for the recovery of puni-

contract for sale nor rejection or return of the goods shall bar or be deemed inconsistent with a claim for damages or other remedy.

IND. CODE § 26-1-2-721 (Burns Supp. 1975), *amending id.* § 26-1-2-721 (Burns 1974). Even in its prior form this section was meant to make clear that, in a suit for fraud under Article 2 of the UCC, the plaintiff could both rescind and get the benefit of his bargain. The failure of attorneys to cite this section has led to some Indiana decisions which might have gone the other way. *See, e.g., Capitol Dodge, Inc. v. Haley*, 288 N.E.2d 766 (Ind. Ct. App. 1972).

⁵⁹IND. CODE § 24-4.5-3-202(d) (Burns Supp. 1975), *amending id.* § 24-4.5-3-202 (Burns 1974). For the full text of the amendment see the Real Estate Settlement Procedures Act section, *infra* note 2. Whether closing costs are part of the finance charge in consumer sales has not yet been settled. *See* IND. CODE § 24-4.5-2-202(3) (treating reasonable closing costs as additional charges for disclosure purposes in consumer credit sales).

⁶⁰IND. CODE § 22-2-6-2 (Burns Supp. 1975), *amending id.* § 22-2-6-2 (Burns 1974). This amendment is discussed in the Secured Transactions section *infra*.

⁶¹316 N.E.2d 381 (Ind. Ct. App. 1974) (first district).

⁶²323 N.E.2d 270 (Ind. Ct. App. 1975) (first district).

⁶³*Physicians Mutual Ins. Co. v. Savage*, 296 N.E.2d 165 (Ind. Ct. App. 1973); *Standard Land Corp. v. Bogardus*, 289 N.E.2d 803 (Ind. Ct. App. 1972).

⁶⁴Typically Indiana—and indeed most jurisdictions—had permitted punitive damages only in cases involving intentional torts. In consumer matters, however, the Indiana courts increasingly have favored the award of punitive damages. *See, e.g., Bob Anderson Pontiac, Inc. v. Davidson*, 293 N.E.2d 232 (Ind. Ct. App. 1973); *Capital Dodge, Inc. v. Haley*, 288 N.E.2d 766 (Ind. Ct. App. 1972).

⁶⁵316 N.E.2d at 384. *See also Rex Ins. Co. v. Baldwin*, 323 N.E.2d 270, 274 (Ind. Ct. App. 1975).

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

VII. Contracts and Commercial Law

*Gerald L. Bepko**

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

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

A. Statute of Frauds

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

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

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

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¹See pp. 131-32 *supra*.

²See p. 130 & note 58 *supra*.

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