

its citizens, we find that the County has no standing to raise the issue of constitutionality of this statute.⁹⁶

The court perceived article 1, section 1, of the Indiana Constitution as guaranteeing the political and civil rights of only the human inhabitants of the state. Indiana's privileges and immunities clause was held applicable only to "citizens," and a county, which is not a citizen, is not protected. Similarly, the county was deemed to lack status to invoke article 4, section 23, of the Indiana Constitution,⁹⁷ but the court noted that an individual or nongovernmental corporation adversely affected by a statute would have standing to invoke this provision, which prohibits local or special laws.

The court did suggest in dictum that, as the record stood, the statute would have withstood low level scrutiny or the "reasonableness" test defined in the opinion, since the Board had not carried its burden of proof to overcome a presumption of constitutionality.⁹⁸

VI. Consumer Law

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During the current survey period, major developments in consumer law involved the extension and redefinition of protections and remedies which were developed in previous years. Although no new major consumer-oriented legislation was enacted this year, several federal statutes were amended to extend or change their coverage.¹ Noteworthy cases in this survey period

⁹⁶*Id.* at 101.

⁹⁷The court noted that no claim was made that the county, as a governmental entity, was injured by the statute and that such a claim would not be valid against the power of the state over its subdivisions.

⁹⁸330 N.E.2d at 101.

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¹Consumer Leasing Act of 1976, Pub. L. No. 94-240 (Mar. 23, 1976), amends the Truth in Lending Act, 15 U.S.C. §§ 1601-65 (1970); and the Equal Credit Opportunity Act Amendments of 1976, Pub. L. No. 94-239 (Mar. 23, 1976), amends the Equal Credit Opportunity Act of 1974, 15 U.S.C. §§ 1691-91f (Supp. V, 1975); the Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145 (Dec. 12, 1975), repealed a section of the Sherman Antitrust Act, 15 U.S.C. § 1 (1970), and a section of the Federal Trade Commission Act, 15 U.S.C. § 45 (1970).

created some new rights,² extended previously created causes of action to apply to more classes of people,³ and reaffirmed and re-defined recently created remedies.⁴

A. Statutory Developments

1. Amendments to the Equal Credit Opportunity Act

The 1976 amendments to the Equal Credit Opportunity Act amend title VII of the Consumer Credit Protection Act⁵ so that it is now unlawful in granting credit to discriminate on the basis of race, color, religion, national origin, or age. The Equal Credit Opportunity Act of 1974⁶ prohibited discrimination on the basis of sex or marital status in granting credit and gave the Federal Reserve Board power to enforce its provisions.⁷ In an action by an individual, the penalties provided for denying credit on the basis of sex or marital status included actual damages, punitive damages up to \$10,000, and reasonable attorney's fees and costs.⁸

The 1976 amendments attempt to identify every irrelevant factor, not limited to sex or marital status, used in deciding whether or not to grant credit. After sex as a basis for discrimination, it appeared to Congress that age was the most common factor in such discrimination.⁹ Although the potential creditor could protect himself by adequately securing a loan, older persons have been refused credit for such insufficient reasons as unavailability of credit life insurance, reduced income upon retirement, or the possibility that the applicant would not live through the credit term.¹⁰

One of the most important provisions added by the new amendments allows credit applicants to obtain a statement of

²Guernsey v. Rich Plan of the Midwest, 408 F. Supp. 582 (N.D. Ind. 1976) (established private cause of action under the FTC Act).

³Barnes v. Mac Brown & Co., 342 N.E.2d 619 (Ind. 1976) (implied warranty of fitness for habitation extends to subsequent purchasers).

⁴Vernon Fire & Cas. Ins. Co. v. Sharp, 349 N.E.2d 173 (Ind. 1976) (affirming award of punitive damages in contract case); Jones v. Abriani, 350 N.E.2d 635 (Ind. Ct. App. 1976) (awarding punitive damages in a contract case and discussing rejection under the UCC).

⁵15 U.S.C. §§ 1601-91e (Supp. V, 1975).

⁶*Id.* §§ 1691-91e.

⁷*Id.* § 1691b.

⁸*Id.* § 1691e(e); see also Whaley, *Consumer Law, 1975 Survey of Recent Developments in Indiana Law*, 9 IND. L. REV. 118, 126 (1975).

⁹The new amendments, of course, still allow a creditor to refuse credit to someone who has not yet reached the age of majority. S. REP. No. 589, 94th Cong. 2d Sess. 3 (1976).

¹⁰*Id.*

reasons for "adverse action" taken against them.¹¹ Congress apparently reasoned that this provision would help achieve the goals of the Act, since a creditor who knows he may have to explain his decision not to grant credit is less likely to rest that decision on improper grounds. A statement of reasons for adverse action may be given by the creditor along with a rejection, or the creditor may simply inform the applicant of his right to such a statement upon request.¹²

Another change in the Act made by the present amendments involves enforcement procedure and civil liability. Before the amendments, the Act could be enforced only by aggrieved individuals or by the Federal Reserve Board. Now, however, the Attorney General has authority to bring actions against violators.¹³

Potential civil liability for a prospective violator has been dramatically increased.¹⁴ The individual plaintiff may still recover actual damages, punitive damages up to a limit of \$10,000, and attorney's fees. In class actions, however, recovery of punitive damages up to the lesser of \$500,000 or one percent of the creditor's net worth, in addition to actual damages and attorney's fees, is allowed.¹⁵

2. *Consumer Leasing Act of 1976*

Congress also amended the Truth in Lending Act¹⁶ by passing the Consumer Leasing Act of 1976.¹⁷ The stated purpose of this new law is to protect consumers against inadequate and misleading leasing information, to require full and complete disclosure of lease terms, and to limit liability in connection with leasing arrangements.¹⁸ The Act applies only to personal property leased for personal, family, or household purposes for a period longer than four months and for a total obligation not exceeding \$25,000.¹⁹ Therefore, the Act will primarily affect lease of expensive

¹¹Adverse action is defined as a rejection of credit, revocation, unilateral change in the terms of a credit plan, or refusal to grant substantially all the credit requested. 15 U.S.C.A. § 1691(d) (6) (Supp. 2, 1976).

¹²*Id.* § 1691(d) (2).

¹³*Id.* § 1691e(h).

¹⁴Prior to the amendments, the Act provided for recovery of actual damages, punitive damages up to \$10,000 and reasonable attorney's fees and costs. 15 U.S.C. § 1691e(b) (Supp. V, 1975).

¹⁵15 U.S.C.A. § 1691e(b) (Supp. 2, 1976). Previously, the Act allowed for class action recovery of the lesser of \$100,000 or one percent of the creditor's net worth. 15 U.S.C. § 1691e(c) (Supp. V, 1975).

¹⁶*Id.* §§ 1601-91e.

¹⁷Pub. L. No. 94-240 (Mar. 23, 1976).

¹⁸S. REP. No. 590, 94th Cong., 2d Sess. 1 (1976).

¹⁹15 U.S.C.A. § 1667 (Supp. 2, 1976).

consumer items such as automobiles, television sets, and other large appliances. Disclosures required by the Act include the following: identification of the leased property, the amount of any down payment or security charge, the amount of any incidental fees payable by the lessee, the number, amount, and due dates of periodic payments and the total amount of these payments, a description of insurance requirements, and the amount of any security interest to be retained by the lessor.²⁰ These disclosures must be made before the lease is signed and can be made in the lease document itself. The civil liability imposed upon a non-complying lessor by this Act is the same as that imposed by the Truth in Lending Act,²¹ including both actual damages and twice the amount of any finance charge paid.

3. *Consumer Goods Pricing Act of 1975*

The purpose of the Consumer Goods Pricing Act of 1975²² is to repeal the federal antitrust exemptions which permitted the states to enact fair trade laws. Fair trade laws allowed manufacturers to require retailers to resell goods at prices set by the manufacturers.²³ Typically the manufacturer entered into a contractual agreement with a retailer whereby the manufacturer set a minimum or stipulated price at which his product could be sold. In 1931 California became the first state to pass a fair trade law and other states followed.²⁴ However, it was apparent that any such state law which applied to interstate commerce violated federal antitrust laws. This inconsistency was eliminated in 1937 when Congress passed the Miller-Tydings Act,²⁵ granting state fair trade laws an exemption from the Sherman Antitrust Act.²⁶

After the various state fair trade laws went into effect, some manufacturers attempted to set resale prices not only for retailers who had signed fair trade contracts, but also for retailers who had not signed contracts. In *Schwegmann Bros. v. Calvert*

²⁰*Id.* § 1667a.

²¹*Id.* § 1667d. The Truth in Lending Act provides for recoveries equal to any actual damages sustained plus twice the amount of any finance charge and reasonable attorney's fees. There is also a provision for class action recovery. 15 U.S.C. § 1640(a) (Supp. V, 1975).

²²Pub. L. No. 94-145 (Dec. 12, 1975).

²³It should be noted that repeal of the fair trade laws will not affect the use of suggested prices by manufacturers, unless suggested prices are used to coerce adherence.

²⁴Indiana enacted its Fair Trade Law in 1937. IND. CODE §§ 24-3-1-1 to -8 (Burns 1974).

²⁵15 U.S.C. 1 (1970).

²⁶*Id.*

*Distillers Corp.*²⁷ the United States Supreme Court ruled this practice illegal. Congress responded by passing the McGuire Act,²⁸ which allowed the states to pass fair trade laws with nonsigner clauses.²⁹ This, in effect, permitted a manufacturer to set resale prices on his goods for all retailers, although a fair trade contract could be enforced against a nonsigner only if the manufacturer could produce a fair trade contract signed by at least one retailer.

It appears that Congress intended enactment of the Consumer Goods Pricing Act of 1975 to lower prices of consumer goods and thereby to help curb inflation. The Department of Justice estimated that passage of the bill would save the public \$1.2 billion per year because fair trade laws had increased prices on fair traded goods by about twenty percent.³⁰ Primary opposition to passage of the Consumer Goods Pricing Act came from service-oriented manufacturers and small business groups. Several manufacturers feared that retailers would be reluctant to provide adequate service for their goods without a large guaranteed profit. This would appear to be a minor difficulty, since the manufacturer is in a position to control the distributors who handle his goods and thereby guarantee adequate service. Small business groups were concerned that repeal of fair trade laws might lead to vicious price-cutting, placing the smaller business at a distinct disadvantage. Although this appears to be a greater cause for alarm, Library of Congress statistics suggest the fear is unwarranted.³¹

²⁷341 U.S. 384 (1951).

²⁸15 U.S.C. § 45 (1970).

²⁹The following 13 states enacted fair trade laws with nonsigner provisions: Arizona, California, Connecticut, Delaware, Illinois, Maryland, New Hampshire, New Jersey, New York, Ohio, Tennessee, Virginia, and Wisconsin. 89 Stat. 1570. The following 23 states enacted fair trade laws without nonsigner provisions; Arkansas, Colorado, Florida, Georgia, Idaho, Indiana, Iowa, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Washington, and West Virginia. 89 Stat. 1570. Indiana did enact a nonsigner provision as part of its Fair Trade Law [IND. CODE § 24-3-1-6 (Burns 1974)]. However, in 1957 the Indiana Supreme Court declared this provision unconstitutional on the ground that the statute was broad enough to vest a legislative power to fix prices in private persons. *Bissell Carpet Sweeper Co. v. Shane Co.*, 237 Ind. 188, 143 N.E.2d 415 (1957). The court reached this decision despite a previous finding in federal court that the statute was constitutional under both the United States Constitution and the Indiana Constitution. *Sherwin Williams Co. v. Bargain Barn*, 152 F. Supp. 222 (S.D. Ind. 1954).

³⁰S. REP. NO. 466, 94th Cong., 1st Sess. 6 (1975).

³¹In 1972, states with fair trade laws with nonsigner provisions had a business failure rate of 35.9 failures per 10,000 firms. In fair trade states without the nonsigner provision the rate was 32.2 per 10,000, and in free trade

Although the Consumer Goods Pricing Act will not affect prices of all goods, it should affect the following types of goods: major appliances, television sets, stereo record players, watches, jewelry, some types of clothing, liquor, and prescription drugs.³²

Federal amendments to the Equal Credit Opportunity Act, the new Consumer Leasing Act, and even the Consumer Goods Pricing Act are evidence of Congressional intent to strengthen the protections afforded consumers. This Congressional trend, apparent for several years, may be expected to continue until the consumer appears adequately protected from possible abuse.

The Indiana General Assembly also passed an act affecting consumer affairs during the past year. Public Law 154 granted \$90,000 to the Indiana Department of Public Instruction to be used for the development of guidelines, curricular materials, and workshops to train teachers for classes in consumer rights and free enterprise economics in the state public school system.³³

B. Case Law Developments

Consumer rights were significantly enhanced on February 2, 1976, when Federal Judge Sharp handed down his landmark decision in *Guernsey v. Rich Plan of the Midwest*.³⁴ Plaintiffs' complaint, alleging violation of the Federal Trade Commission Act (FTC Act)³⁵ charged in the first count that the plaintiffs were victimized by defendants' unfair and deceptive acts and practices in violation of a section of the FTC Act.³⁶ The defendant moved to dismiss this count, alleging that the FTC Act has no provision for private enforcement, since the Commission has original jurisdiction over all complaints.³⁷ In holding that the plaintiffs had

states the rate was 23.3 per 10,000. S. REP. No. 466, 94th Cong., 1st Sess. 3 (1975).

³²It should be noted, however, that liquor manufacturers will still be able to enforce stipulated resale prices in states which pass price-fixing statutes pursuant to the twenty-first amendment. See IND. CODE §§ 7.1-1-1-1 to 7.1-5-11-16 (Burns Supp. 1976).

³³This Act became effective July 1, 1976. Unfortunately, it expires July 1, 1977. Act of Feb. 26, 1976, Pub. L. No. 154, 1976 Ind. Acts 911.

³⁴408 F. Supp. 582 (N.D. Ind. 1976).

³⁵15 U.S.C. §§ 41-58 (1970). The plaintiffs also alleged violations of the following: 15 U.S.C. §§ 2, 77a-77bbb (1970), 15 U.S.C. § 1640 (Supp. V, 1975), the torts of fraud and misrepresentation, and the Indiana Deceptive Sales Practices Act, IND. CODE § 26-1-2-313 (Burns 1974). 408 F. Supp. at 585. It should also be noted that suit was filed after a cease and desist order had been issued and after defendant had allegedly violated the order.

³⁶15 U.S.C. § 45 (1970). 408 F. Supp. at 585.

³⁷*Id.* at 586. See *La Salle Street Press, Inc. v. McCormick & Henderson, Inc.*, 293 F. Supp. 1004 (N.D. Ill. 1968).

stated a cause of action pursuant to 15 U.S.C. § 45(a)(1),³⁸ the court stated that the FTC does not have exclusive jurisdiction for enforcement of the FTC Act and that to hold that it does would frustrate the legislative intent of the Act.³⁹ The court reasoned that if the FTC were to have exclusive jurisdiction, a private consumer who was victimized by a deceptive practice would, in effect, be denied recovery.⁴⁰ On the other hand, allowing a private cause of action does not diminish the FTC's role in enforcing the Act.⁴¹ The case thus establishes a private consumer's right to sue a defendant allegedly guilty of using a deceptive practice pursuant to provisions of the FTC Act.

In *Barnes v. Mac Brown & Co.*,⁴² the Indiana Supreme Court held that a builder-vendor's implied warranty of fitness for habitation, as developed in *Theis v. Heuer*,⁴³ extends not only to the first purchaser of a dwelling house, but also to a subsequent purchaser who is damaged by a latent defect.⁴⁴ The case arose when the plaintiff, a second purchaser of a house, discovered that his basement leaked because of a crack around three of the basement walls, and sued the defendant builder.

It is interesting to note that the supreme court applied the "logic" developed in products liability-personal injury cases in reaching a decision about a real property-economic loss situation.⁴⁵ The court, in a relatively short and simple opinion, has drastically affected the law concerning sale of homes to the public. However, it is not clear at this time what ramifications this development may have in the consumer law area.⁴⁶

In 1974 the First District Court of Appeals of Indiana, in the case of *Vernon Fire & Casualty Insurance Co. v. Sharp*,⁴⁷ upheld an award of punitive damages in a breach of contract action involving the bad faith failure of an insurance company to honor

³⁸*Contra*, *Holloway v. Bristol-Myers*, 485 F.2d 986 (D.C. Cir. 1973).

³⁹408 F. Supp. at 588.

⁴⁰*Id.*

⁴¹*Id.*

⁴²342 N.E.2d 619 (Ind. 1976). For discussion of this case by another author see Polston, *Property, infra*.

⁴³270 N.E.2d 764 (Ind. Ct. App. 1971), *transfer granted and opinion adopted*, 280 N.E.2d 300 (Ind. 1972).

⁴⁴342 N.E.2d at 620.

⁴⁵*Id.* at 620-21. The court cited, in addition to *Theis v. Heuer*, *J.I. Case Co. v. Sandefur*, 245 Ind. 213, 197 N.E.2d 519 (1964) and *Campo v. Scofield*, 301 N.Y. 468, 95 N.E.2d 802 (1950), two products liability-personal injury cases.

⁴⁶A significant step in the development of Indiana law in this area is *Old Town Development Co. v. Langford*, 349 N.E.2d 744 (Ind. Ct. App. 1976), a case which postdates the period of this survey.

⁴⁷316 N.E.2d 381 (Ind. Ct. App. 1974).

a claim.⁴⁸ This decision appeared to reverse the long-standing rule requiring proof of an independent intentional tort before allowing recovery of punitive damages.⁴⁹

On June 10, 1976, the Indiana Supreme Court affirmed the court of appeals decision on the issue of punitive damages.⁵⁰ The supreme court held that "the public policy of this State permits the recovery of punitive damages under the circumstances of this case."⁵¹ However, the holding was tempered by an observation that there was ample evidence in the record to support a finding of the tort of fraud.⁵² It therefore remains to be seen whether the Indiana Supreme Court will continue to require proof of an independent tort before allowing recovery of punitive damages in a contract case.

The Court of Appeals for the First District delivered an important opinion for consumers this year in *Jones v. Abriani*.⁵³ The decision, written by Judge Lowdermilk,⁵⁴ carefully reviewed the judicial options available to the purchaser of a defective product and resolved some questions concerning punitive damages in contract cases. The case arose when plaintiffs purchased a defective mobile home from defendants. At the time of purchase, plaintiffs gave defendants a \$1,000 down payment. At delivery it was obvious that several items were defective and within a short time almost everything in the trailer, including the kitchen sink, showed a defect.⁵⁵ Plaintiffs stated that they did not want the home in the condition delivered, but defendants replied that if they did not take the home the down payment would be forfeited. Plaintiffs moved into the home on condition that the defects would be fixed. After numerous attempts to have the defects repaired or the items replaced, plaintiffs brought suit.

The court of appeals concluded that, although the theory relied upon by the trial court in granting relief to the plaintiffs

⁴⁸See Whaley, *Consumer Law, 1975 Survey of Recent Developments in Indiana Law*, 9 IND. L. REV. 118, 131 (1975).

⁴⁹*Physicians Mutual Ins. Co. v. Savage*, 296 N.E.2d 165 (Ind. Ct. App. 1973).

⁵⁰*Vernon Fire & Cas. Ins. Co. v. Sharp*, 349 N.E.2d 173 (Ind. 1976). This case is also discussed in Bepko, *Contracts & Commercial Law, infra* and Frandsen, *Insurance, infra*.

⁵¹349 N.E.2d at 185.

⁵²*Id.* at 184.

⁵³350 N.E.2d 635 (Ind. Ct. App. 1976), also discussed in Bepko, *Contracts and Commercial Law*. A petition to transfer has been filed in this case.

⁵⁴Robertson, C.J., and Lybrook, J., concurred.

⁵⁵350 N.E.2d at 639. Among defects listed were the following: a chipped sink, a missing curtain, a missing shutter, a floor plan different from the one ordered, a leak in the roof, crooked doors, a broken chair, a gas leak in the furnace, and defective carpeting.

was not clear, four separate grounds for relief were adequately supported by the evidence. These were: refusal of the defendants to recognize a valid rejection, refusal to recognize a rightful revocation of acceptance, breach of an express warranty, and breach of an implied warranty of merchantability.⁵⁶

In regard to the valid rejection of the goods, the court noted that the sellers were not justified in threatening to withhold the down payment if the plaintiffs refused to take possession of the home.⁵⁷ The court also held that use of the mobile home by the plaintiffs did not cancel the initial rejection of the defective product, because the use was the result of oppressive conduct by the defendants.⁵⁸ This result was reached despite the language found in section 2-602(2) (a) of the Uniform Commercial Code: "[A]fter rejection any exercise of ownership by the buyer with respect to any commercial unit is wrongful as against the seller,"⁵⁹ and in spite of many decisions holding that use of goods after a valid rejection turns the rejection into an acceptance.⁶⁰

The issue of punitive damages in a contract case was also discussed in *Abriani*.⁶¹ The trial judge had awarded the plaintiffs \$3,000 in punitive damages. In affirming this result, the court extended the recovery of punitive damages in contract cases beyond insurance company defendants or cases in which an independent tort of fraud is proved. Specifically, the court stated that punitive damages may be granted in a contract case (1) when the evidence shows fraudulent and oppressive action by the defendant, even though those do not establish all the elements of the tort of fraud, and (2) when punitive damages will deter future wrongful conduct and thereby serve the public interest.⁶²

The importance of this case to consumers was emphasized by the court when it stated: "In fact, it is hard to imagine where the public interest to be served is more important than in consumer matters, especially where the consumer is in an inferior bargaining position and forced to either sign an adhesion contract or do without the item desired."⁶³

⁵⁶*Id.* at 645.

⁵⁷*Id.* at 643.

⁵⁸*Id.* at 644.

⁵⁹IND. CODE § 26-1-2-602(2) (a) (Burns 1974).

⁶⁰350 N.E.2d at 644. The court did add, however, that the seller could show damages as the result of any wrongful use by the buyers.

⁶¹For other recent cases dealing with this problem, see *Vernon Fire & Cas. Ins. Co. v. Sharp*, 349 N.E.2d 173 (Ind. 1976); *Hibschman Pontiac, Inc. v. Batchelor*, 340 N.E.2d 377 (Ind. Ct. App. 1976); *Rex Insurance Co. v. Baldwin*, 323 N.E.2d 270 (Ind. Ct. App. 1975).

⁶²350 N.E.2d at 650. Of course, punitive damages are always available if the tort of fraud is proved.

⁶³*Id.*