

IV. Commercial Law

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A. Dishonored Checks

During the past several years there has been a movement in Indiana to permit non-lawyers to practice law as employees of corporations in small claims courts.¹ This movement is based, at least in part, on the assumption that retail merchants must frequently sue on dishonored checks. Arguably, corporate retail merchants should be entitled to file and prosecute these routine cases through non-lawyer employees without incurring the extra expense of hiring a lawyer. This argument, however, not only makes the dubious assumption that less expense would be incurred by prosecuting such cases through non-lawyer employees, but it also ignores the existence of two different statutes designed to shift the cost of litigation on dishonored checks to the defaulting drawer.² Both of these statutes have been the subject of developments this year which have increased their potential efficacy for plaintiffs suing on dishonored checks.

The first statute is Indiana Code section 34-4-30-1 which provides that:

If a person suffers a pecuniary loss as a result of a violation of IC 35-43, he may bring a civil action against the person who caused the loss for (1) an amount equal to three (3) times his actual damages; (2) cost of the action; and (3) a reasonable attorney's fee.³

Indiana Code article 43 of title 35 contains the portion of the Indiana Criminal Code dealing with offenses against property,⁴ and Indiana

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¹The Indiana Legislature enacted a statute permitting corporations to practice law in small claims court but that statute was held in violation of the Indiana Constitution in *State ex rel. Western Parks, Inc. v. Bartholomew County Court*, 383 N.E.2d 290 (Ind. 1978). The Supreme Court Rules Committee recommended a Supreme Court Practice Rule to permit some limited practice by corporate employees in closely-held corporations but the supreme court did not adopt such a rule. In 1981, H.R.J. Res. 1 was introduced in the Indiana Legislature. This joint resolution was a preliminary effort to amend the Indiana Constitution to permit corporations to practice law and to overcome the decision in the *Bartholomew* case. H.R.J. Res. 1 did not pass the 1981 Indiana Legislature.

²IND. CODE §§ 34-4-30-1 (Supp. 1981), 28-2-8-1 (1976 & Supp. 1981).

³*Id.* § 34-4-30-1.

⁴*Id.* §§ 35-43-1-1 to -5-5.

Code section 35-43-5-5 deals specifically with check deception. Section 35-43-5-5 provides that "[a] person who knowingly or intentionally issues or delivers a check . . . for the payment of . . . money . . . knowing that it will not be . . . honored upon presentment . . . commits check deception, a Class A misdemeanor."⁵ Presumptions are available to aid in proving check deception. Issuance of a check which is later dishonored constitutes prima facie evidence that the person issuing the check knew that it would not be honored. Similarly, evidence that a person had insufficient funds in his account or had no account constitutes prima facie evidence that the person knew that the check would not be honored.⁶ Aided by these presumptions, a holder of a dishonored check can combine Indiana Code sections 35-43-5-5 and 34-4-30-1 to sue the drawer for treble damages, costs, and attorney's fees.

This past year, the Indiana Court of Appeals decided two cases which involved suits under these provisions of the Indiana Code. These cases clarified the rights of the holder of a dishonored check. First, in *American Leasing, Inc. v. Maple*,⁷ the court of appeals made it clear that it is unnecessary to establish that there has been a conviction under Indiana Code article 43 of title 35 to recover treble damages, costs, and attorney's fees under Indiana Code section 34-4-30-1.⁸ Second, before a person can recover under Indiana Code section 34-4-30-1, he must show a pecuniary loss.⁹ The court of appeals held that when a check is dishonored, the payee is denied the money represented by the check and thus suffers a pecuniary loss for purposes of Indiana Code section 34-4-30-1.¹⁰ Third, in *McMahon Food Co. v. Call*,¹¹ the court of appeals laid to rest the argument that Indiana Code section 34-4-30-1 is unconstitutional because it exposes the defendant to double jeopardy.¹² This argument is based on a very old case, *Taber v. Hutson*,¹³ which has created much mischief in the Indiana courts. In *Taber*, the court stated that:

The constitution declares, that "no person shall be twice put in jeopardy for the same offence;" and though that provision may not relate to the remedies secured by civil proceedings,

⁵*Id.* § 35-43-5-5(a).

⁶*Id.* § 35-43-5-5(c).

⁷406 N.E.2d 333 (Ind. Ct. App. 1980).

⁸*Id.* at 335.

⁹*Id.*

¹⁰*Id.*

¹¹406 N.E.2d 1206 (Ind. Ct. App. 1980).

¹²*Id.* at 1208 (citing *State ex rel. Beedle v. Schoonover*, 135 Ind. 526, 35 N.E. 119 (1893)).

¹³5 Ind. 332 (1854).

still it serves to illustrate a fundamental principle inculcated by every well-regulated system of government, viz., that each violation of the law should be certainly followed by one appropriate punishment and no more.¹⁴

Thus, the argument follows that a person should not be exposed to the imposition of a punitive damages award and criminal prosecution for the same conduct. Later cases have made it clear, however, that the *Taber* case did not unveil a constitutional restriction but simply stated a judicial policy.¹⁵ The legislature should be able to enact a statute which provides for a penalty in the form of punitive damages to be awarded to a plaintiff in a civil proceeding and at the same time provide criminal penalties for the same conduct. In any case, the wisdom of two penalties could be questioned when a second punishment is sought and not, as in these cases, at the time when punitive damages are sought prior to any criminal proceeding. Thus, Indiana Code section 34-4-30-1 contains no constitutional defect, and the award of punitive (treble) damages is available in cases of dishonored checks.

Finally, a question exists as to the amount on which a treble damage award should be based. Indiana Code section 34-4-30-1 states that the aggrieved party may bring an action for an amount equal to three times his "actual damages."¹⁶ The court of appeals in *Maple* made it clear that the recovery is three times the face amount of the check.¹⁷

The second statutory basis for shifting the costs of suits on dishonored checks is found in Indiana Code section 28-2-8-1. This section provides for recovery of interest, costs, and a reasonable attorney's fee in a suit against a person who issues a check and allows the check to be dishonored for lack of funds, failure to have an account, or lack of an authorized signature. This year the Indiana Legislature made some clarifying amendments to this statute. Prior to amendment, Indiana Code section 28-2-8-1 provided that the holder was entitled to recover if the check was dishonored by a banking institution.¹⁸ This year the Indiana General Assembly expanded this language so that it applies to cases where a check or draft is dishonored by a "financial institution."¹⁹ This language ex-

¹⁴*Id.* at 335.

¹⁵State *ex rel.* Beedle v. Schoonover, 135 Ind. 526, 35 N.E. 119 (1893); State *ex rel.* Scobey v. Stevens, 103 Ind. 55, 2 N.E. 214 (1885).

¹⁶IND. CODE § 34-4-30-1 (1976 & Supp. 1981).

¹⁷406 N.E.2d at 334.

¹⁸IND. CODE § 28-2-8-1 (1976) (amended 1981) provided that: "[a] person who . . . allows the check or draft to be dishonored by a *banking institution* . . . is . . . liable . . ." (emphasis added).

¹⁹*Id.* § 28-2-8-1 (Supp. 1981).

pands the coverage of the statute to cases in which instruments are drawn on credit unions and savings and loan associations, entities which have gone into the business of issuing checks or negotiable orders of withdrawal. Secondly, prior to amendment, Indiana Code section 28-2-8-1 provided that a successful plaintiff on a dishonored check was entitled to interest at the rate of eight percent. This rate has been increased to eighteen percent to reflect current market rates of interest.²⁰ Furthermore, the old Indiana Code section 28-2-8-1 was unclear whether the interest was due from execution of the instrument until a judgment was entered or from execution until the judgment was finally paid. Under the revised statute, it is clear that interest is due for the period until the amount is paid in full.

Under the previous statute, it was not clear whether a successful plaintiff was entitled to recover reasonable attorney's fees if the attorney who prosecuted the action on the check was an employee of the plaintiff. Under the revised statute, the successful plaintiff is entitled to recover reasonable attorney's fees incurred by the holder if the responsibility for collection is referred to an attorney who is not a salaried employee of the holder. Thus, if the action on the check is prosecuted by a lawyer who is a salaried employee of the plaintiff, the plaintiff will not be entitled to an attorney's fee as part of the award. On the other hand, if the attorney is a private practitioner representing the plaintiff-holder, the holder will be entitled to recover a reasonable attorney's fee. Finally, the revised statute provides a minimum recovery. If the holder is successful, he is entitled to a minimum attorney's fee of \$100.²¹

B. Treble Damages and Deceptive Advertising

The intentional dissemination of a deceptive advertisement is a Class A misdemeanor under Indiana Code section 35-43-5-3(a)(10). Thus there is the potential for a victim of a false advertisement to recover costs, attorney's fees, and treble damages under Indiana Code section 34-4-30-1 discussed in the previous section. In *McCormick Piano and Organ Co. v. Geiger*,²² the court of appeals dealt with such a case under a predecessor statute which contained language nearly identical to Indiana Code section 34-4-30-1.²³ In *Geiger*, the defendant published an advertisement stating that a certain

²⁰This interest rate has been set by statute and is not subject to adjustment as interest rates rise or, as is more likely, fall. Eighteen percent could become punitive, rather than a figure designed to reflect the cost of money, if rates return to levels of earlier years.

²¹*Id.* § 28-2-8-1 (Supp. 1981).

²²412 N.E.2d 842 (Ind. Ct. App. 1980).

²³IND. CODE § 35-17-5-12(7) (1976) (repealed 1976).

piano was on sale for \$699. The advertisement contained a drawing of the piano on sale. In fact, the drawing was a composite of other pianos which more closely resembled a piano priced at \$1,500. Although they did not actually buy a piano, the plaintiffs were misled by the composite and brought suit alleging, among other things, that they were entitled to treble damages under the predecessor to Indiana Code section 34-4-30-1. The case was tried to a jury which gave a judgment to the plaintiff for \$14,000.

On appeal, the court concluded that this award was not supported by the proof and remanded the case. In the course of its opinion, the court stated that a recovery of treble damages under this statute is tied to the existence of actual damages which “contemplates common-law damages, i.e., the difference in value between that which the plaintiff parted with and that which he received.”²⁴ The court concluded that the plaintiff’s disappointed expectations did not constitute actual damages and could not be the basis for a treble damage award.²⁵

This interpretation of the language “actual damages” is quite restrictive. In order to show actual damages and be able to recover treble damages, the plaintiff first must have purchased the falsely advertised product. It makes little sense to require victims to purchase falsely advertised products in order to secure a remedy. This is especially true if the plaintiff discovered the deception after going to the defendant’s place of business in reliance on the advertisement. Even if the plaintiff has purchased the product, the plaintiff still must show that the price paid exceeded the value received. According to the court in *McCormick Piano*, the difference between price and value would be “actual damages.” In a transaction such as the one in *McCormick Piano*, this difference might be totally unrelated to the false advertising. For example, assume that the piano which was falsely depicted in the advertisement was worth \$1,500 and that the piano which was actually on sale was worth \$699. If the plaintiff paid \$699, the court would find no actual damages even though the plaintiff may have been lured into the transaction by intentionally deceptive advertising. Fortunately, this interpretation of the expression “actual damages” developed in the *McCormick Piano* case focused on the since repealed statute. It may be appropriate to re-think this conclusion when considering the interpretation to be placed on the expression “actual damages” in Indiana Code section 34-4-30-1.

²⁴412 N.E.2d at 853.

²⁵*Id.*

C. Banks as Holders In Due Course

In *St. Paul Fire & Marine Insurance Co. v. State Bank of Salem*,²⁶ the court of appeals was presented with two questions concerning whether a collecting bank was a holder in due course of a check. In that case *A* drew a check on a Louisville bank in favor of *B* who took the check to the Salem bank where *B* had an account. The Salem bank took the check for collection in a transaction in which Salem applied part of the funds represented by the check in satisfaction of debts *B* owed to Salem, gave some cash to *B*, and gave a credit to *B*'s account for the balance. Later the same day, an official of Salem bank began to investigate the transaction and examined the check more carefully. After this inquiry, Salem "froze" the transaction and reversed the credits which had been made to *B*'s account. When the check was presented to the Louisville bank for payment, it was dishonored because *A*, the drawer, had ordered payment stopped. Salem brought suit against *A* on his drawer's contract. *A* raised defenses, and Salem asserted the status of a holder in due course who took the instrument free from the defenses.²⁷ Thus, a question was raised concerning whether the bank was a holder in due course. The trial court entered a judgment for the bank concluding that the bank was a holder in due course, and the drawer appealed.

On appeal the drawer argued that the bank was not a holder in due course for two reasons. First, the drawer argued that the Salem bank had not given value because it had not changed its position in reliance on the check; it simply made bookkeeping entries at the time it took the check for collection. In addition, shortly after taking the check, on the same afternoon, the bank reversed these bookkeeping entries. These arguments ignore the plain language of UCC 3-303(b), which states that a holder takes the instrument for value "when he takes the instrument in payment of or as security for an antecedent claim against any person whether or not the claim is due."²⁸ In this case the bank took the check partly in satisfaction of *B*'s debts owed to the Salem bank. Moreover, the bank gave value under UCC 4-208(1) and UCC 4-209. Under UCC 4-209, a bank has given value to the extent that it has a security interest in an item.²⁹ Under UCC 4-208(1), a bank has a security interest in an item and accompanying proceeds in the "case of an item deposited in an account to the extent to which credit given for the item has been with-

²⁶412 N.E.2d 103 (Ind. Ct. App. 1980).

²⁷See IND. CODE § 26-1-3-305(2) (1976).

²⁸*Id.* § 26-1-3-303(b) (1976).

²⁹*Id.* § 26-1-4-209 (1976).

drawn or applied.”³⁰ In this case the credit given for the item had been applied to antecedent debts.

Second, the drawer argued that the Salem bank was not a holder in due course because it had taken the instrument with notice of a defense. UCC 3-304(1)(a) provides that a holder has notice of a defense if “the instrument is so incomplete, bears such visible evidence of forgery or alteration, or is otherwise so irregular as to call into question its . . . terms”³¹ In fact, there was evidence on the face of the check that it had been altered. In the space ordinarily used to express the amount of the check in words there appeared “[t]he sum of \$100478 and 23 cts” imprinted by a check-writing machine. In the space where the amount is customarily written in numbers, there was some irregularity. Next to the printed dollar sign were the typed numbers 478.23. The number 100 was typed crudely in an uneven line in front of this number so that the second “0” was over the printed dollar sign. Despite this irregularity, the court of appeals concluded that the trial court had not erred in deciding that the bank did not have notice of a defense at the time it took the check.³² In reaching this conclusion, the court referred to UCC 3-118(c) which deals with ambiguous terms and rules of construction. That section provides that words control figures unless the words are ambiguous. According to Official Comment 1 to UCC 3-118, the purpose of this rule of construction “is to protect holders . . . by stating rules of law which will preclude a resort to parol evidence for any purpose except reformation of the instrument.”³³ This rule permits holders to take instruments confident in the fact that they can be enforced according to the written words. Holders need not be concerned about parol evidence which shows that the amount which appears in numbers is in fact the amount due on the instrument. The amount applied by the checkwriter in this case was considered a written term. Thus the irregularity on the face of the check, which had to do with numerical terms, did not alter the right of a holder to rely on the written term and did not give notice of a defense.

D. *Implied Warranties by Non-Merchants*

This past year, in *Vetor v. Shockey*,³⁴ the court of appeals examined the question of whether the warranty of habitability is made

³⁰*Id.* § 26-1-4-208(1)(a) (1976). Under this language the bank may have been a holder in due course for part of the face amount of the check.

³¹*Id.* § 26-1-3-304(1)(a) (1976).

³²412 N.E. 2d at 110.

³³U.C.C. § 3-118, Official Comment 1.

³⁴414 N.E.2d 575 (Ind. Ct. App. 1980).

by a non-merchant seller of a house. In that case the defendant, Vetor, purchased the house in question in 1973. In October, 1977, Vetor sold the house to Shockey. Shortly thereafter, Shockey discovered defects in the septic system and sued Vetor claiming the cost of repair to the septic system. The trial court held that Vetor was responsible for the cost of repair on the ground that there was a breach of the implied warranty that the septic system was in proper working order.

Vetor appealed and the court of appeals reversed the trial court and held that a warranty of habitability is not made by a non-builder vendor.³⁵ The court noted that there is some support in the literature for the proposition that an implied warranty of merchantability should be found in every sale of a used residence whether or not the seller is a merchant.³⁶ This viewpoint protects the legitimate expectations of consumers who purchase residential property and in doing so make the largest investment of their lives. Despite this argument, courts which have addressed this issue have unanimously held that no warranty of habitability is made in these cases and have concluded that the only basis for recovery should be found in the tort theories of misrepresentation or fraudulent concealment of defects known to the vendor at the time of sale.³⁷ This conclusion is consistent with the standard applicable to the sale of goods. UCC 2-314 provides for a warranty of merchantability only if the seller is a merchant with respect to the goods sold.³⁸

E. Privity Requirement

If a defective product causes personal injury or property damage, there is generally no barrier to recovery against the manufacturer or distributors of the product even if there was no privity between the buyer and those parties. If, however, the buyer's loss can be explained only in economic terms not associated with personal injury or property damage, sometimes described as a loss of the bargain, the Indiana courts have stated that the buyer may recover only against those with whom the buyer had a contract, that is, those with whom the buyer was in privity.³⁹

³⁵*Id.* at 577.

³⁶*Id.* (citing Haskell, *The Case for an Implied Warranty of Quality in Sales of Real Property*, 53 GA. L. REV. 633, 650-52 (1965)).

³⁷*Wilhite v. Mays*, 140 Ga. App. 816, 232 S.E.2d 141, *aff'd*, 239 Ga. 31, 235 S.E.2d 532 (1977); *Tavares v. Horstman*, 542 P.2d 1275 (Wyo. 1975).

³⁸IND. CODE § 26-1-2-314(1) (1976).

³⁹*See Richards v. Goerg Boat & Motors, Inc.*, 384 N.E.2d 1084 (Ind. Ct. App. 1979) *discussed in* Bepko, *Contracts, Commercial Law, and Consumer Law, 1979 Survey of Recent Developments in Indiana Law*, 13 IND. L. REV. 107, 110 (1980). *See generally* *Industrial Graphics, Inc. v. Asahi Corp.*, 485 F. Supp. 793 (1980) (Applying Minnesota

This past year the Indiana Court of Appeals reaffirmed this position in *Candlelight Homes, Inc. v. Zornes*,⁴⁰ a case in which the principle is made part of the holding and stated more clearly than in previous cases. In *Candlelight Homes*, the buyer purchased a mobile home from Candlelight. The mobile home had been manufactured by Fairmount and sold to Candlelight, its authorized dealer. There was no evidence that Fairmount ever had any dealings with the buyer. The mobile home contained a variety of defects, and the buyer sued both Candlelight and Fairmount. Candlelight was defunct and unable to pay a judgment. Thus, the buyer proceeded solely against Fairmount. After a jury trial, the court entered a judgment in favor of the buyer against Fairmount, and Fairmount appealed. The court of appeals reversed, stating that the Indiana courts have adopted the majority view which requires privity for recovery of the loss of bargain for breach of warranty.⁴¹

Two exceptions to the privity bar in cases where there is only economic injury should be noted. First, the defendant manufacturer may have participated in the sale process such as by discussing the

law, the implied warranty of merchantability which attaches to any party who could reasonably be expected to use or be affected by the goods, was extended to include the manufacturer-wholesaler relationship); *Mellander v. W.F. Kileen*, 86 Ill. App. 3d 213, 407 N.E.2d 1137 (1980) (The implied warranty of habitability is a contract action requiring privity; therefore, it does not extend to a subsequent purchaser lacking privity with the builder-vendor); *Steckman Nat'l Realty and Inv. Corp., Ltd. v. J.I. Case Co.*, 99 Misc. 2d 212, 415 N.Y.S.2d 946 (1979) (Breach of warranty is contractual remedy requiring privity, which precluded the subsequent purchaser of a defective product from recovery against the manufacturer); *Iacono v. Anderson Concrete Corp.*, 42 Ohio St. 2d 88, 326 N.E.2d 267 (1975) (An action in tort, based on the properly pleaded theory of breach of implied warranty, is proper to recover for property damages, when an action in contract would fail due to lack of privity); *A.T.S. Laboratories, Inc. v. Cessna Aircraft Co.*, 59 Ohio App. 2d 15, 391 N.E.2d 1041 (1978) (a manufacturer may be held liable to an ultimate buyer for damage to the product on the theory of breach of implied warranty even though the manufactured item was purchased from third parties as original buyers in a used condition); Note, *Recovery of Direct Economic Loss: The Unanswered Questions of Ohio Products Liability Law*, 27 CASE W. RES. L. REV. 683 (1977); Note, *Knox v. North American Car Corp.: Re-examination of Privity of Contract in UCC Implied Warranty Actions*, 11 LOY. CHI. L.J. 637 (1980); Note, *Minnesota Statutory Warranties on New Homes—An Examination and Proposal*, 64 MINN. L. REV. 413 (1980); Casenote, *Sales: Extension of Implied Warranty of Merchantability to Used Goods*, 46 MO. L. REV. 249 (1981); Note, *Builders' Liability for Latent Defects in Used Homes*, 32 STAN. L. REV. 607 (1980); Comment, *The Implied Warranty of Habitability: A Dream Deferred*, 48 U. MO. KAN. CITY L. REV. 237 (1980).

⁴⁰414 N.E.2d 980 (Ind. Ct. App. 1981).

⁴¹*Id.* at 981-82 (citing *Lane v. Barringer*, 407 N.E.2d 1173 (Ind. Ct. App. 1980); *Richards v. Goerg Boat & Motors, Inc.*, 384 N.E.2d 1084 (Ind. Ct. App. 1979); *Thompson Farms, Ind. v. Corno Feed Products*, 173 Ind. App. 682, 366 N.E.2d 3 (1972)). In all of these cases, the courts ignored *Barnes v. MacBrown*, 264 Ind. 227, 342 N.E.2d 619 (1976) which seems to hold otherwise.

goods with the consumer, providing demonstration or inspection opportunities for the consumer, or dealing directly with the consumer concerning problems and corrective measures.⁴² This type of participation removes the privity barrier. Second, the manufacturer may have made express warranties to the consumer. The court in *Candlelight Homes* suggests that if an express warranty had been made by the manufacturer to the buyer, there would be a right to sue on the express warranty.⁴³

F. Express Warranties

UCC 2-313(1) provides that express warranties may be created in sale of goods transactions by "any affirmation of fact or promise made by the seller to the buyer which relates to the goods . . .," by "any description of the goods . . .," or by any sample or model.⁴⁴ The affirmation, promise, description, samples, or models become express warranties only if they are "part of the basis of the bargain."⁴⁵ UCC 2-313(2) provides that an "affirmation merely of value . . . or a statement purporting to be merely the seller's opinion . . ." does not create a warranty.⁴⁶ In *Royal Business Machines, Inc. v. Lorraine Corp.*,⁴⁷ the United States Court of Appeals for the Seventh Circuit examined three problems concerning the UCC language on express warranties. The court's decision may be of importance in future commercial litigation.

1. *Affirmations of Fact vs. Puffing.*—In *Royal*, the plaintiff sued for breach of a warranty concerning some copier machines provided by the seller, Royal. The trial court found that Royal made and breached a series of express warranties based on statements that the machines were of high quality, that the frequency of repairs was very low, and that the use of the machines in the buyer's rental business would return substantial profits to the buyer.

On Royal's appeal the Seventh Circuit found these statements to be simply expressions of the seller's opinion or puffing, not express warranties.⁴⁸ The court explained that the decisive test of whether a representation is a warranty or simply an expression of the seller's opinion is whether the seller "asserts a fact of which the buyer is ignorant or merely states an opinion or judgment on the matter of

⁴²See *Richards v. Goerg Boat & Motors, Inc.*, 384 N.E.2d 1084 (Ind. Ct. App. 1979).

⁴³414 N.E.2d at 982.

⁴⁴IND. CODE § 26-1-2-313(1) (1976).

⁴⁵*Id.* § 26-1-2-313(1)(a) (1976).

⁴⁶*Id.* § 26-1-2-313(2).

⁴⁷633 F.2d 34 (7th Cir. 1980).

⁴⁸*Id.* at 42.

which the seller has no special knowledge and on which the buyer may be expected also to have an opinion and to exercise his judgment."⁴⁹ The court said that the statement that the copiers were of high quality was simply a statement of opinion or puffing "expected in any sales transaction, rather than a positive averment of fact describing a product's capabilities"⁵⁰ The representation that the frequency of repair was "very low" lacks the specificity of an affirmation of fact upon which a warranty could be predicated, and the representation concerning substantial profits was merely sales talk and the expression of a seller's opinion.⁵¹

The court made it clear that a finding of an express warranty is a question of fact for the trier of fact.⁵² A finding of an express warranty necessarily takes into account the setting in which the statement was made including any trade custom or course of dealing which might give meaning to the statement. For example, the statement that the frequency of repair was "very low" may have had a relatively precise meaning in the setting of this transaction based on general understandings in the copier supply industry. It was not clear if such usages of trade may have influenced the trial judge's decision or whether the court of appeals gave appropriate deference to the trial judge's role in fact-finding with respect to these alleged warranties.

2. *Statements Not Related to the Goods.*—In *Royal*, the trial court also found that the seller, *Royal*, made a warranty that replacement parts would be readily available for the copier machines and that the cost of supplies would remain low—no more than one-half cent per copy.⁵³ The Seventh Circuit found that these statements did not create an express warranty. The court emphasized that to create express warranties, the affirmations of fact must relate to the goods sold.⁵⁴ The court reasoned that the statement about the availability of parts and the cost of supplies did not relate to the goods and thus could not serve as the basis of an express warranty.

This reasoning leads to an extremely narrow interpretation of the requirement of UCC 2-313(1) that the affirmation of fact relate to the goods. The court seems to suggest that to relate to the goods,

⁴⁹*Id.* at 41.

⁵⁰*Id.* at 42 (citing *Thompson Farms, Inc. v. Corno Feed Products*, 173 Ind. App. 682, 366 N.E.2d 3 (1977)).

⁵¹633 F.2d at 42.

⁵²*Id.* at 43 (citing *General Supply and Equip. Co. v. Phillips*, 490 S.W.2d 913 (Tex. Civ. App. 1972)).

⁵³633 F.2d at 41.

⁵⁴*Id.* at 42.

the statement must describe the goods or some performance characteristic of the goods. This may ignore the fact that UCC 2-313(1) express warranties are created by affirmations of fact which relate to the goods *or* descriptions of the goods. If the expression "relate to the goods" meant the same as a description of the goods, it would not have been necessary to set forth these two different methods of creating express warranties in the statute. Moreover, it may be important for a buyer to know about such things as availability of parts and supply costs because the utility of the goods may be directly related to these facts. To exclude these commitments from the scope of express warranties on the ground that they do not relate to the goods seems to ignore this commercial need.

Finally, the court's conclusion leaves an important question unanswered. The court addressed this question as if the only liability which could be fixed on the seller was by way of express warranty. The conclusion that a seller of goods could not make commitments concerning the availability of replacement parts or the cost of supplies would be unfortunate. There should be no limitation on the type of commitment a seller can make. The seller should be able to make contract commitments concerning any aspect of a bargain and should not be limited to making express warranties as narrowly defined by this court. Thus, even if the commitments concerning the availability of parts and the costs of supplies were not express warranties within this narrow meaning of UCC 2-313, the statements would still constitute basic contract commitments for which liability could be imposed in a suit on the contract. This may have been a basis for upholding the trial court's decision which the court of appeals did not explore, and it is not clear what the trial court must do on remand.

3. *Part of the Basis of the Bargain.*—The requirement that the affirmation, promise, description, sample, or model be "part of the basis of the bargain" is the UCC's successor to the requirement in the Uniform Sales Act that the buyer must have relied on the warranty statement.⁵⁵ It is clear that because the Sales Act formulation was changed, something less than specific reliance is necessary to prove an express warranty. White and Summers, the authors of the most prominent textbook on the subject, suggest that the new formulation may create a presumption of reliance.⁵⁶ In the *Royal* case, the court dealt with one dimension of the element of reliance which is contained in the expression "part of the basis of the bargain." In

⁵⁵UNIFORM SALES ACT § 12 provided that "an affirmation of fact . . . is an express warranty . . . if the buyer purchases the goods relying thereon."

⁵⁶J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 9-4, at 334-35 (2d ed. 1980).

remanding the case for a new trial, the court of appeals emphasized that the arrangement between Royal and the buyer involved a series of sales over approximately an eighteen-month period.⁵⁷ On remand the trial court was to consider that the knowledge of the parties and the reliance which the buyer may place on a statement made by a seller's representative may change in light of the circumstances. A buyer may have expanding knowledge of the capacities of the product purchased. This greater knowledge would have to be taken into account in deciding whether the seller's representations were part of the basis of the bargain. The court said that "[t]he same representations that could have constituted an express warranty early in the series of transactions might not have qualified as an express warranty in a later transaction if the buyer had acquired independent knowledge as to the fact asserted."⁵⁸

G. *Statute of Limitations: Sales of Goods*

The Uniform Commercial Code provides a statute of limitations for sale of goods transactions. UCC 2-725(1) provides that an action for breach of any contract for sale must be commenced within four years after the cause of action has accrued.⁵⁹ UCC 2-725(2) provides that "[a] cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach."⁶⁰ For purposes of this limitation period, a breach of warranty "occurs when tender of delivery is made except . . . where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance"⁶¹ In that case, the cause of action accrues only when the breach is or should have been discovered.

In *Stumler v. Ferry-Morse Seed Co.*,⁶² the United States Court of Appeals for the Seventh Circuit was asked to interpret the expression "where a warranty explicitly extends to future performance of the goods." In *Stumler*, the plaintiff purchased seed from the defendant in December of 1974. The seed was described in a brochure in such a way that there was an express warranty that the seed would produce a particular kind of tomato. The plaintiff took delivery of the seed in March of 1975. At harvest time in September of 1975, the plaintiff discovered that the tomatoes produced from the seed were not in conformity with the express warranty. On June

⁵⁷633 F.2d at 44.

⁵⁸*Id.*

⁵⁹IND. CODE § 26-1-2-725(1) (1976).

⁶⁰*Id.* § 26-1-2-725(2).

⁶¹*Id.*

⁶²644 F.2d 667 (7th Cir. 1981)(per curiam).

20, 1979, the plaintiff filed suit for breach of warranty, and the defendants moved for summary judgment on the ground that this claim was time-barred under UCC 2-725(1). The trial court held that the limitation period began at the time of delivery in March of 1975, and entered judgment for the defendant because the suit was not filed until June of 1979, more than four years later.

On appeal, the plaintiff urged that the express warranty extended to future performance and that discovery of the non-conformity had to await the completion of the growing season. Thus, the limitation period did not begin at delivery but began only when the breach was or should have been discovered. The court of appeals disagreed with this argument and affirmed the trial court. The court held that the express warranty concerning the type of fruit to be produced did not explicitly extend to future performance.⁶³ Before an express warranty explicitly extends to future performance, a warranty must refer to a future time.⁶⁴ Examples of warranties that extend to future performance are life-time guarantees, five-year warranties, or 50,000-mile warranties for motor vehicles. The fact that it was necessary for the plaintiff to wait for a period of time before he could determine whether the seed was in conformity with the express warranty did not cause the warranty to *explicitly* extend to future performance.⁶⁵

H. *Warranty by Endorsement*

Lenders often advance funds to permit the borrower to complete the purchase of goods which are to serve as collateral for the obligation to repay the loan. In some of these transactions, the lender will want to employ some method of policing the transaction to ensure that the secured transaction is properly documented.⁶⁶ One such method is to place language on the back of the loan proceeds check which commits the payees, upon endorsement and transfer, to a warranty that the secured transaction is properly documented. In *White Truck Sales, Inc. v. Shelby National Bank*,⁶⁷ the court of appeals had occasion to examine the efficacy of such a provision on a check. In that case, the bank loaned \$21,575 to Gevedón who was to

⁶³*Id.* at 672.

⁶⁴*Id.*

⁶⁵*Id.*

⁶⁶IND. CODE § 26-1-9-302(4) (1976) provides that a security interest in a motor vehicle other than inventory held for sale for which a certificate of title is required under Indiana statutes must be perfected by indication of the security interest on the certificate of title. The notation on the certificate of title usually must be requested by the person initiating the assignment of the title certificate.

⁶⁷420 N.E.2d 1266 (Ind. Ct. App. 1981).

use the funds to buy a truck from White. The truck in turn was to serve as collateral to secure Gevedon's obligation to repay the amount of the loan. The loan proceeds were transferred by way of a check made payable to Gevedon and White. On the back of the check there was the following form of endorsement:

This check together with the down payment in cash and or trade-in constitutes payment in full for 1-1974 *Auto-Car*, Serial No. *AB006HB071483*

By endorsing, each payee warrants and covenants that an application has been or promptly will be filed for a certificate of title to said property in the name of *William J. Gevedon* subject to a lien in favor of

The Shelby National Bank, 49 Public Square, Shelbyville, Indiana 46176⁶⁸

This check was endorsed by both Gevedon and White, and the proceeds were apparently applied to the purchase price of the truck. Unfortunately, White failed to note the bank as a lien holder on the assigned certificate of title, and Gevedon sold the truck free and clear of the bank's lien.

After Gevedon's default on the loan agreement, the bank sued and acquired a default judgment against him, but the judgment could not be collected because Gevedon disappeared and had no assets. The bank then sued White on the contract created by White's endorsement of the check. After a bench trial, the court entered a judgment against White for the amount owed on the loan contract, and the court of appeals affirmed.⁶⁹ Thus, the Indiana courts seem to have given broad approval to this warranty device and have also established that the remedy for breach of the warranty is the amount due on the loan. The remedy may be different if the seller can show that the value of the goods was always less than the amount due on the loan.

⁶⁸*Id.* at 1268.

⁶⁹*Id.* at 1267.

