

IV. Commercial Law

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A. *Scope of UCC Article 2*

This year, in *Tousley-Bixler Construction Co. v. Colgate Enterprises, Inc.*,¹ the court of appeals had an opportunity to decide a case that may help clarify the differences between transactions in goods,² which are governed by Uniform Commercial Code (UCC) Article 2, and real property related transactions, which are governed by the common law of contracts. The case involved an alleged contract for the sale of 50,000 cubic feet of clay located approximately four to eight feet beneath the surface of the seller's property. Under the alleged agreement, the clay was to be removed by the buyer. Before any clay was removed, however, a dispute arose regarding the existence of the contract, and the seller filed suit. At the close of the trial, the trial judge instructed the jury on the subject of formation of contracts under both the common law of contracts and the Indiana version of UCC Article 2. The judge apparently intended the jury to decide first whether the alleged agreement was a transaction in goods or an ordinary contract, and then to apply the correct principles of law. The jury found for the seller. The buyer appealed the decision contending that a transaction in goods was not involved, and, thus, the trial judge erred in giving instructions under Indiana's version of UCC Article 2.³

An analysis of the trial judge's instruction should begin with an examination of UCC 2-105(a), which defines the term "goods" as "things . . . which are movable at the time of identification to the contract"⁴ including "things attached to realty as described in the section on goods to be severed from realty (section 2-107)."⁵ UCC 2-107 provides that "[a] contract for the sale of timber, minerals or the like . . . is a contract for the sale of goods . . . if they are to be severed [from the land] by the seller."⁶ If, however, they are to be severed

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¹429 N.E.2d 979 (Ind. Ct. App. 1982).

²U.C.C. § 2-102 provides that "this Article applies to transactions in goods." IND. CODE § 26-1-2-102 (1982).

³429 N.E.2d at 980.

⁴IND. CODE § 26-1-2-105(1) (1982).

⁵*Id.*

⁶*Id.* § 26-1-2-107(1). In an effort to make available the more streamlined financing provisions of UCC Article 9, there was a movement in timber growing states to have timber treated as goods regardless of whether the buyer or the seller removed the timber. The permanent editorial board followed the lead of the timber growing states and, in 1966, changed the language of UCC 2-107 to eliminate the word "timber" from subsection 1. A.L.I., THE OFFICIAL TEXT OF THE UNIFORM COMMERCIAL CODE app. II, § C, at 882 (West 1978). Indiana has not made this change.

by the buyer, the transaction resembles a lease of the real property and the transaction should be governed by the common law governing mineral leases. Using this formulation, the court concluded that the clay under the ground was a "mineral or the like" and thus, would constitute goods only if the seller was to remove the clay.⁷ Because the buyer in *Tousley-Bixler* was to remove the clay, the sale involved an ordinary contract, not a transaction in goods; therefore, the jury was not at liberty to apply the principles of UCC Article 2. Thus, the trial judge had erred in giving instructions to the jury under UCC Article 2.⁸

Although the appellate court in *Tousley-Bixler* concluded that the trial judge had given incorrect instructions, the question remained whether the error was harmless. To a great extent, the UCC is a codification of common law.⁹ Those portions of the UCC that are not codifications of common law are often applied by courts by way of analogy, or as a recognition of the fact that the UCC contains the most recent and authoritative exposition of commercial law.¹⁰ Professor Grant Gilmore called this use of the UCC "statutory radiation."¹¹ Thus, if the UCC either codifies, or is to be used in shaping, the common law, then there would be no harm in giving UCC instructions because there would be no difference between the UCC and the relevant common law. In *Tousley-Bixler*, however, the trial judge's instructions incorporated UCC 2-207, the "battle of the forms" section that makes a radical departure from the common law.¹²

Under UCC 2-207(1), a contract can be concluded by the exchange of documents, even if the documents contain different or additional terms. The common law doctrine provides that a responsive document containing different or additional terms does not form a contract but, instead, constitutes a counter offer.¹³ This difference between the common law and UCC 2-207(1) was too stark to permit the appellate court in *Tousley-Bixler* to conclude that the trial judge's error was harmless. Thus, the case was reversed and remanded for a new trial.¹⁴ Implicit in the court's holding is the assumption that there is to be no statutory

⁷429 N.E.2d at 982.

⁸*Id.* at 983.

⁹See generally Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code*, 27 STAN. L. REV. 621, 622-23 (1975) (suggesting that states were merely stating, rather than making, law when they adopted the UCC).

¹⁰See *Weaver v. American Oil Co.*, 257 Ind. 458, 276 N.E.2d 144 (1971); *Wagner Constr. Co. v. Noonan*, 403 N.E.2d 1144 (Ind. Ct. App. 1980).

¹¹1 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 10.7, at 315 (1965).

¹²See J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 1-2 (2d ed. 1980).

¹³RESTATEMENT (SECOND) OF CONTRACTS § 59 (1979).

¹⁴429 N.E.2d at 983.

radiation from UCC 2-207(1) and that it should not be applied by analogy to shape the common law in Indiana.

B. *Warranty Booklet Received After Sale*

Generally, a written disclaimer or a modification of a warranty that is contained in a manufacturer's manual or booklet is not binding on a purchaser if the manual or booklet is received by the purchaser after a commitment to purchase has been made.¹⁵ This general dogma appears to be based on the assumption that the purchaser had not assented to the disclaimer; therefore, such disclaimers are ineffective, in the absence of proof that the purchaser assented to the terms of the booklet. This past year, in *Hahn v. Ford Motor Co.*,¹⁶ the court of appeals had occasion to examine the limits of this dogma in a most interesting case.

In *Hahn*, the buyers of an auto brought a suit for breach of warranty against the dealer, Lorey, and the manufacturer, Ford, claiming various defects in a 1977 Ford purchased from Lorey. Lorey counterclaimed for the balance due on the purchase price. At the jury trial, the trial court admitted into evidence the Ford warranty facts booklet, which contained modifications of the implied warranty of merchantability. Although implied warranties were acknowledged in the booklet, their duration was limited to the twelve month or twelve thousand mile duration of the express warranty. The purchasers, Mr. and Mrs. Hahn, claimed to have found this booklet in the glove box after taking delivery of the auto. Judgment was entered on the jury's verdict for Lorey on the counterclaim and against the Hahns on the warranty claim. The Hahns appealed contending that the trial court erred in admitting the booklet.¹⁷

The Hahns argued that the booklet was "inadmissible on evidentiary grounds because its relevance depended upon the existence of another conditioning fact—that it was part of the parties' contract."¹⁸ The appellate court, recognizing that the scope of its review was limited to the Hahns' argument, affirmed the trial court's decision.¹⁹

In reaching its decision, the appellate court pointed out that if the only basis for objection to the booklet was the question concerning the existence of a conditioning fact, then the trial court's role was

¹⁵J. WHITE & R. SUMMERS, *supra* note 12, § 12-5, at 446.

¹⁶434 N.E.2d 943 (Ind. Ct. App. 1982).

¹⁷Other issues on appeal included whether the trial court erred in admitting the warranty into evidence, in granting judgment in Ford's favor regarding punitive damages, in refusing to give one of the plaintiffs' instructions, and in failing to allow plaintiffs, as counter defendants, to assert rejection or revocation as a defense to Lorey's counterclaim. *Id.* at 946.

¹⁸434 N.E.2d at 948.

¹⁹*Id.* at 957.

limited to determining whether there was evidence "from which the ultimate fact finder could find the existence of the conditioning fact."²⁰ The conditioning fact was that the warranty disclosure "was part of the parties' contract,"²¹ presumably at the time the original sale agreement was struck. The appellate court explained that there was evidence in the trial record from which the jury could have found the existence of the conditioning fact; that is, that the Hahns were "cognizant of a 12,000 mile/12 month limitation on the duration of any implied warranties."²² Moreover, there was testimony that at the time of sale there was a discussion of an extended warranty plan. Although there was no specific testimony that a twelve month or twelve thousand mile limitation was discussed, the appellate court found that the trial court reasonably could have inferred that such a discussion took place. In order for there to be a discussion of the value of the extended warranty, there would have to have been some recognition of the limits on the basic express and implied warranties. On the basis of this evidence, the trial court could have concluded that Ford made a prima facie showing that the limitation was within the Hahns' knowledge at the time of sale. The appellate court held, therefore, that the trial court "did not err in admitting into evidence the booklet, which contained an identical limitation."²³

Throughout its discussion of this issue, the court of appeals was careful to point out that it was addressing only the narrow, evidentiary issue raised by the Hahns.²⁴ The court suggested that there may be a basis, if properly advanced, for excluding a warranty booklet such as the one in this case. The court, in dicta, stated that limitations contained in such a booklet are "ineffective as a matter of law" unless the parties assent to them, presumably after receiving the booklet.²⁵ This part of the *Hahn* opinion should be carefully examined by anyone representing a buyer who is confronted with limitations found in such a warranty booklet.

The court in *Hahn* also addressed the issue of the validity of the

²⁰*Id.* at 949 (citing C. McCORMICK, HANDBOOK ON THE LAW OF EVIDENCE § 53 (E. Cleary 2d ed. 1972)).

²¹434 N.E.2d at 948.

²²*Id.* at 949.

²³*Id.* at 950.

²⁴The court stated:

This is quite a distinct argument than one which overtly attacks the effectiveness of a warranty limitation on sufficiency grounds, i.e., whether the evidence is sufficient to sustain an inference the parties consented to the terms of a warranty modification and limitation. We are, of course, limited in our scope of review and address only those issues properly raised by the parties.

Id. at 948.

²⁵434 N.E.2d at 948.

dealer's disclaimer. At the time of sale, Mr. Hahn signed a dealer's warranty disclaimer entitled "As Is, Manufacturers Warranty Only."²⁶ The language of the document was not quoted in the opinion, but the clear meaning of the document was that Lorey made no warranties and that the purchasers were to look exclusively to warranties made by Ford. This is a device commonly used by dealers in an effort to avoid product quality commitments. On appeal, the Hahns argued that the trial court erred in admitting this document into evidence. The court of appeals rejected the Hahns' arguments and confirmed the efficacy of the dealer's warranty disclaimer.²⁷ Implicit in the court's decision was the assumption that the reference in the dealer's disclaimer to the manufacturer's warranty was not sufficient to incorporate, by reference, the warranty booklet and its limitations.²⁸

C. Remedy Limitations

Remedy limitations are contract provisions that apportion risks in transactions.²⁹ A remedy limitation will usually come into play after some liability has been established, such as for breach of warranty. The contract provision may limit the remedy: by setting a particular remedy, such as repair or replacement of defective parts, as the exclusive remedy; by imposing conditions on remedies, such as giving notice within a certain time period; or by setting a maximum dollar amount on the damages that may be recovered.

During the past year, there were two cases in Indiana concerning remedy limitations. In one case, *General Bargain Center v. American Alarm Co.*,³⁰ the remedy limitation was enforced to limit the defendant's liability. In the other case, *Carr v. Hoosier Photo Suppliers, Inc.*,³¹ the remedy limitations were narrowly construed so that they did not operate to protect the defendant against full liability.

In *General Bargain Center*, the American Alarm Company (American) installed a burglar alarm system for General Bargain Center (General). Thereafter, a burglary was committed at General's premises and General lost \$19,000 in merchandise. General brought

²⁶*Id.* at 953.

²⁷*Id.* at 954.

²⁸For example, arguably, the manufacturer's limitations on warranty were incorporated by reference, by way of the documents signed at the time of sale. This result, however, would probably be inconsistent with the "conspicuous" requirements of U.C.C. § 2-316(2). IND. CODE § 26-1-2-316(2) (1982).

²⁹The U.C.C. § 2-719 deals with contractual modification or limitation of remedy. IND. CODE § 26-1-2-719 (1982).

³⁰430 N.E.2d 407 (Ind. Ct. App. 1982).

³¹422 N.E.2d 1272 (Ind. Ct. App. 1981). For a discussion of the bailment aspects of this case, see Krieger, *Property, 1982 Survey of Recent Developments in Indiana Law*, 16 IND. L. REV. 283, 288 (1983).

a suit against American claiming that the loss was the result of American's failure to comply with the terms of the agreement. American defended on the ground that the clauses in the contract between General and American limited American's liability to \$250. On the front page of the written contract between General and American, the following language appeared immediately over the signatures of the parties:

The reverse of this agreement is incorporated herein. Please read carefully. We are not an insurer. Our maximum liability is limited to \$250.00. User acknowledges receipt of copy and that he has read and understands reverse side of agreement particularly Paragraph #9.³²

Paragraph 9 on the reverse side of the contract document contained similar language. In particular, Paragraph 9 stated that:

[I]f Company should be found liable for loss or damage due from a failure of Company to perform any of the obligations herein, including but not limited to installation, maintenance, monitoring or service or the failure of the system or equipment in any respect whatsoever, Company's liability shall be limited to a sum equal to the total of six (6) monthly payments or Two Hundred Fifty (\$250.00) Dollars, whichever is the lesser, as liquidated damages and not as penalty and this liability shall be exclusive. . . .³³

The trial court relied on the language of these clauses to limit liability to the maximum amount of \$250 and entered summary judgment accordingly.³⁴ General appealed, and the court of appeals affirmed the trial court's decision, concluding that there were no issues of fact and that there was no basis for declaring the remedy limitations to be unenforceable.³⁵

Two additional matters should be noted in connection with this case. First, the court rejected the argument made on appeal that, because General did not understand the consequences of this remedy limitation, the limitation was unconscionable.³⁶ Although this contract agreement was not a transaction in goods, clearly the principle of unconscionability applies³⁷ and, presumably, the trial court should have followed the procedure in UCC 2-302.³⁸ The result on this issue in

³²430 N.E.2d at 410 (quoting contract).

³³*Id.* at 409 (quoting contract).

³⁴*Id.*

³⁵*Id.* at 412.

³⁶*Id.*

³⁷*See Weaver v. American Oil Co.*, 257 Ind. 458, 276 N.E.2d 144 (1971).

³⁸IND. CODE § 26-1-2-302 (1982) provides that as a matter of law, the trial judge makes

General Bargain Center points up the need for the party claiming unconscionability to request a hearing in the trial court on the issue of unconscionability, and then, at the hearing, the party should offer evidence of the commercial setting at the time of the agreement. This evidence should include evidence of any imbalance in bargaining power that may exist, evidence that the contract was an "adhesion contract" given without options as to whether to accept its terms, evidence of the harshness of the provision in dispute, or evidence that a term was obscure or not understood. Apparently, General did not request such a hearing, offered no such proof, and therefore, could not raise the issue on appeal. Moreover, if all the terms of UCC 2-302 apply, the issue of unconscionability, although similar to an issue of fact, is decided by the trial judge who must have some discretion in making determinations of unconscionability.

Secondly, the possibility that the contract clause in question operated as a liquidated damages clause did not seem fully developed by the court of appeals. A liquidated damages clause is a term that establishes a reasonable estimate of the actual injury that may be suffered as a result of a breach and sets that estimate as the stipulated recovery for breach.³⁹ Paragraph 9 of the contract in *General Bargain Center* refers to the stipulated amount of recovery as "liquidated damages."⁴⁰ If this language were intended to operate as a liquidated damages clause, it could be interpreted as providing a recovery of \$250 for any breach. Under this interpretation, it is possible that the clause is overly broad and could be void because it would operate as a penalty. For example, if American made some very minor error in performance of the contract, which did not cause any injury to General, this clause could be interpreted to accord General a right to recover \$250. Applied in this situation, because the \$250 recovery would bear no relation to any injury suffered by General, it would not be a reasonable estimate and, therefore, the clause would be unenforceable under common law restrictions on penalties.⁴¹ If this clause were unenforceable because it operated as a penalty in this situation, then serious questions could be raised concerning its enforceability as a remedy limitation.

a determination on the question of unconscionability, based on the circumstances existing at the time the contract was made. IND. CODE § 26-1-2-302(2) (1982) provides that "[w]hen it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making a determination." *Id.*

³⁹See generally E. FARNSWORTH, *CONTRACTS* § 1218, at 895 (1982); J. MURRAY, *MURRAY ON CONTRACTS* § 234, at 473 (2d rev. ed. 1974).

⁴⁰430 N.E.2d at 409.

⁴¹See E. FARNSWORTH, *supra* note 39, § 1218; J. MURRAY, *supra* note 39, § 234.

This analysis suggests the need for a drafting approach that carefully isolates and tests the operation of a clause, first, as a liquidated damages clause, and second, as a remedy limitation. In *General Bargain Center*, the clause functioned as a remedy limitation. To achieve that function and to avoid the problem raised in this Survey, a safer drafting approach would have been to state that American was responsible for any actual losses resulting from a breach up to a maximum of \$250. If there were specific breaches that the parties wished to be covered by a liquidated damages clause, the breaches should have been isolated and a reasonable estimate of loss recorded in the agreement.

The other case concerning a remedy limitation, *Carr v. Hoosier Photo Suppliers, Inc.*,⁴² is Indiana's first vacation film case. In that case, Carr, a lawyer, took a trip to Europe and used nine rolls of Kodak film to make a photographic record of the trip. Upon returning to the United States, he took the nine rolls to Hoosier Photo, which in turn sent them to Kodak for development. Four of these rolls were lost and never returned to Carr. Carr brought suit against Hoosier Photo and Kodak claiming losses associated with the expenses of the vacation. Both Hoosier Photo and Kodak claimed the benefit of the remedy limitations found on the boxes of film and on the receipt that was given to Carr when he gave his film to Hoosier Photo for development. The limitation on the receipt was as follows:

READ THIS NOTICE

Although film price does not include processing by Kodak, the return of any film or print to us for processing or any other purpose, will constitute an agreement by you that if any such film or print is damaged or lost by us or any subsidiary company, even though by negligence or other fault, it will be replaced with an equivalent amount of Kodak film and processing and, except for such replacement, the handling of such film or prints by us for any purpose is without other warranty or liability.⁴³

The statement on the box of film was as follows:

READ THIS NOTICE

This film will be replaced if defective in manufacture, labeling, or packaging, or if damaged or lost by us or any subsidiary company even though by negligence or other fault. Except for such replacement, the sale, processing, or other handling of

⁴²422 N.E.2d 1272 (Ind. Ct. App. 1981), *rev'd*, No. 2-476 A 124 (Ind. Nov. 12, 1982).

⁴³*Id.* at 1274.

this film for any purpose is without other warranty or liability.⁴⁴

Disregarding these limitations, the trial court awarded to the plaintiff a judgment for damages in the amount of \$1,013.60, and all parties cross-appealed.⁴⁵

The court of appeals had to decide whether either of the remedy limitations were effective to protect either defendant. In approaching this question, the court seemed guided by the principle that remedy limitation clauses are to be strictly construed and must be unambiguous in order to deprive a party of a remedy. This principle was borrowed from Indiana cases involving indemnification clauses.⁴⁶ The court stated that the reasoning of the cases dealing with indemnification clauses was applicable for both indemnification and remedy limitation clauses because both clauses protect a party from the consequences of negligence or breach.⁴⁷

1. *Hoosier Photo*.—Hoosier Photo claimed the benefit of the provision on the film box. The court made short work of this argument pointing out that Hoosier Photo was not a party to the sale of the film and could not rely on terms of a contract to which it was not a party.⁴⁸ The wording on the Hoosier Photo receipt was more troublesome. The court assumed that this receipt recorded the terms of the contract between Hoosier Photo and Carr, but concluded that the clause limited Hoosier Photo's liability only in the event film was "returned" to Hoosier Photo.⁴⁹ Thus, in this instance, the clause did not apply because Hoosier Photo "had never previously possessed the film."⁵⁰

2. *Kodak*.—Kodak also claimed the benefit of the provision on the film box. The court rejected this argument on the ground that the clause on the film box did not apply to film processing.⁵¹ The court reasoned that processing was an entirely separate transaction for which no payment was made at the time of purchase of the film. This reasoning led the court to conclude that the limitation clause applied only to defects in the film and, even more startling, that "any agreement concerning liability for losses during the processing transaction

⁴⁴*Id.*

⁴⁵*Id.* at 1275.

⁴⁶*Id.* at 1276-77 (citing *Vernon Fire and Casualty Ins. Co. v. Graham*, 166 Ind. App. 509, 336 N.E.2d 829 (1975); *Indiana State Highway Comm'n v. Thomas*, 169 Ind. App. 13, 346 N.E.2d 252 (1976)).

⁴⁷422 N.E.2d at 1276 n.2.

⁴⁸*Id.* at 1276.

⁴⁹*Id.*

⁵⁰*Id.*

⁵¹*Id.*

would have to be made when the arrangements for processing were made."⁵² It is unclear what policy supports this restriction on the right of the parties to allocate risks.

Finally, Kodak urged that it was protected by the language of the receipt. The court agreed that the receipt applied to the processing transaction⁵³ and acknowledged that the film had been "returned" to Kodak, thus, eliminating the obstacle encountered by Hoosier Photo. Nevertheless, the court concluded that the receipt offered no protection for Kodak in this case.⁵⁴ The receipt referred to "the return of any film or print to *us* for processing or any other purpose."⁵⁵ It was not clear to whom the pronoun "us" in the clause referred. According to the court, this ambiguity made it unclear which party was to be protected. Thus, the court refused the protection of the clause to Kodak. In searching for the clear meaning of the clause, the court did not appear to consider that the word "us" seems to have been intended to include all parties that played a role in the course of the film's processing, including Kodak, which was mentioned twice by name in the receipt.

The court's desire to construe strictly these remedy limitations is understandable. The purchaser of film and processing usually has no choice of terms, and the enforcement of the clauses would leave the purchaser without an effective remedy. Nevertheless, the effect of remedy limitations may be a matter better suited for legislative protection rather than a case-by-case judicial scrutiny of the terms.

The final issue in the *Hoosier Photo* case was raised by cross-challenges of the trial court's award of \$1,013.60 in damages. Both the defendants and the plaintiff contended that the award was contrary to the evidence. The plaintiff argued that the cost of the trip, \$6400, was the only evidence of injury and should have been the basis for the award. The defendants apparently argued that the cost of the trip was neither foreseeable nor based on circumstances of which the defendants had reason to know at the time of the contract and that the only compensable loss that the plaintiff proved was the cost of the film, \$13.60. The court of appeals disagreed with both challenges and affirmed the award.⁵⁶ The court noted that in Indiana the trial court has discretion in assessing damages,⁵⁷ and the court found that the trial judge's decision in this case was within the scope of proper

⁵²*Id.*

⁵³*Id.*

⁵⁴*Id.* at 1276-77.

⁵⁵*Id.* at 1277 (emphasis added by court).

⁵⁶*Id.* The supreme court reversed the award. *Hoosier Photo*, No. 2-476 A 124 (Ind. Nov. 12, 1982) (proper award was \$13.60, the cost of the film).

⁵⁷*Id.* (citing *Gene B. Glick Co. v. Marion Constr. Corp.*, 165 Ind. App. 72, 331 N.E.2d 26 (1975); *Smith v. Glesing*, 145 Ind. App. 11, 248 N.E.2d 366 (1969)).

discretion.⁵⁸ Without discussing issues of foreseeability, the court of appeals concluded that the trial judge could have used the total cost of the trip as a starting point and reduced this amount to take into account the benefit to Carr from the five rolls that were successfully developed and the other dimensions of enjoyment associated with the trip.

D. Buyer's Remedies

In *Michiana Mack, Inc. v. Allendale Rural Fire Protection District*,⁵⁹ the Indiana Court of Appeals addressed some interesting questions concerning remedies under UCC 2-714.⁶⁰ In that case, the defendant, Michiana, sold a fire truck to the Allendale Fire Protection District. The truck's motor regularly overheated. Allendale kept the truck, but filed suit seeking damages for breach of warranty. The trial court found that the truck was nonconforming and concluded that the appropriate remedy was to order Michiana to repair the truck or to refund the purchase price and, in either case, to pay damages including Allendale's expenses incurred for interest and insurance on the truck. Michiana appealed claiming that the trial court erred in fashioning the remedy. The court of appeals agreed with Michiana and reversed the trial court's decision pertaining to the remedy.⁶¹

The opinion of the court of appeals includes four important points. First, the appellate court provided a general interpretive gloss for UCC 2-714—the section that furnishes remedies for seller's breach when the buyer does not reject or revoke acceptance. UCC 2-714(1) provides that the buyer "may recover as damages for any non-conformity of tender the loss resulting in the ordinary course of events from the seller's breach."⁶² This subsection is designed to deal with all forms of breach whether the breach pertains to the quality of the goods or to some other aspect of the seller's performance. This is why the drafters used the expression "any non-conformity." Accordingly, UCC 2-714(1) gives the courts broad discretion in fashioning a remedy for nonconformity.

UCC 2-714(2) provides:

The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if

⁵⁸422 N.E.2d at 1278.

⁵⁹428 N.E.2d 1367 (Ind. Ct. App. 1981).

⁶⁰IND. CODE § 26-1-2-714 (1982).

⁶¹428 N.E.2d at 1369. The trial court's final order and judgment was reversed and vacated in part, and modified in part.

⁶²IND. CODE § 26-1-2-714(1) (1982).

they had been as warranted, unless special circumstances show proximate damages of a different amount.⁶³

This subsection deals with a more specific breach related to the quality of goods—a breach of warranty. The remedy for breach of warranty under UCC 2-714(2) is also more specific; it is the difference in the value of the goods as warranted and the value of the goods as accepted.⁶⁴ This difference can be measured by the cost of repair, by the fair market value of the goods as warranted less salvage value of the goods, or by the fair market value of the goods as warranted less the fair market value of the goods received.⁶⁵ Despite the more precise formula of UCC 2-714(2), special circumstances may dictate using a different method for computing the buyer's damages.

The second significant feature of *Michiana Mack* pertains to the trial court's order for Michiana to repair the truck. Specific performance or some other exercise of the court's equitable powers may be appropriate in some cases under UCC 2-714, but the appellate court pointed out that "before such powers are invoked, the court must assure itself that the party's legal remedies are inadequate."⁶⁶ In *Michiana Mack*, there was no evidence that the monetary remedies provided by UCC 2-714 were inadequate to put the buyer in the full performance position; thus, the appellate court found that the trial court's order was in error.⁶⁷

The third significant feature of *Michiana Mack* relates to the trial court's order for Michiana to refund the purchase price. UCC 2-714 does not authorize the use of the purchase price as a measure of recovery. Indeed, the predicate of UCC 2-714 is that the buyer must pay, or has paid, the purchase price and may sue for the specified losses.⁶⁸ UCC 2-717 provides that when the purchase price has not yet been paid, the buyer may, after proper notification, deduct from the price still due all or any part of the damages resulting from the breach.⁶⁹ In some cases, the measure of recovery computed by the formulae of UCC 2-714 may accidentally equal the purchase price. For example, the fair market value of the goods may be one hundred and ten percent of the contract price, and the salvage value may be ten percent of the contract price. The difference between the market value and the salvage value in such a case would equal the contract price.

⁶³*Id.* § 26-1-2-714(2).

⁶⁴*Id.*

⁶⁵428 N.E.2d at 1370 (paraphrasing these three suggestions for applying the formula of UCC 2-714(2) from J. WHITE & R. SUMMERS, *supra* note 12, § 10-2, at 377-81).

⁶⁶428 N.E.2d at 1371.

⁶⁷*Id.*

⁶⁸IND. CODE § 26-1-2-714(1) (1982); *see id.* § 26-1-2-607(1).

⁶⁹*Id.* § 26-1-2-717.

Nevertheless, the use of the contract price, as such, is not authorized by UCC 2-714 and the court of appeals held that the trial court had erred.⁷⁰

Finally, the appellate court found that the trial court had erred in awarding damages based on interest and insurance premiums paid on the truck.⁷¹ The general theory of recovery in the law of contracts and under the UCC provides that the nonbreaching party should be put in the position that she would have been in had the seller's performance been in conformity with the contract.⁷² This is called the full performance position and the formulae of UCC 2-714 are aimed at approximating this position. Ordinarily, the expenses that the buyer incurs, such as for interest or insurance on the goods, are contributions that the buyer has agreed to make to bring about, or to supplement, the full performance position. In other words, if the seller had fully performed, the buyer would have spent these amounts on insurance and interest to produce the desired result. To award additional damages specifically for insurance and interest would be to place the buyer in a position better than full performance and would be in contravention of the UCC's basic theory of recovery. The analysis may be different, however, if the buyer has rejected or revoked acceptance of the goods.⁷³

E. Amendments to the Indiana Deceptive Consumer Sales Act

The Indiana Deceptive Consumer Sales Act⁷⁴ serves as a basis for the Indiana Attorney General to seek relief on behalf of injured consumers against businesses engaged in deceptive practices. Unfortunately, there has been one area of uncertainty in the enforcement pattern: whether the Deceptive Consumer Sales Act applies to deceptive conduct in real property transactions such as those between landlord-tenant or to the solicitation and sale of real property. The Indiana Attorney General wanted to clarify this issue and to make certain that his enforcement powers extend to these transactions. At the same time, the real estate industry was concerned that a broad expansion of the scope of the Indiana Deceptive Consumer Sales Act would create a rash of private law suits by consumers who thought they had been deceived. The industry pointed out that consumers

⁷⁰428 N.E.2d at 1372.

⁷¹*Id.* at 1373.

⁷²See IND. CODE § 26-1-1-106(1) (1982).

⁷³See the discussion of *Coyle Chevrolet Co. v. Carrier*, 397 N.E.2d 1283 (Ind. Ct. App. 1979), in Bepko, *Contracts, Commercial Law, and Consumer Law, 1980 Survey of Recent Developments in Indiana Law*, 14 IND. L. REV. 223, 229 (1981).

⁷⁴IND. CODE §§ 24-5-0.5-1 to -9 (1982).

already had rights under the common law to bring actions for deceptive conduct in real property transactions⁷⁵ and did not need the benefit of expanded coverage under the Deceptive Consumer Sales Act.

In the 1982 session, at the insistence of Attorney General Linley Pearson, the Indiana General Assembly addressed this area of uncertainty and the concerns of the real estate industry by amending the Indiana Deceptive Consumer Sales Act.⁷⁶ First, there was a change in the definition of the term "consumer transaction." Indiana Code section 24-5-0.5-2 now defines a consumer transaction as "a sale, lease, assignment . . . or other disposition of an item of personal property, real property, a service, or an intangible."⁷⁷ Second, to take into account the concerns of the real estate industry, the provisions of the Deceptive Consumer Sales Act that deal with private rights of action were amended by the addition of the following language: "This subsection does not apply to a consumer transaction in real property."⁷⁸

In addition to making clear that the Attorney General may proceed under the Act in real property transactions, the General Assembly added some language to the Act regarding the enforcement powers of the Attorney General. The subsection on Attorney General enforcement now provides:

c. The attorney general of Indiana may bring an action to enjoin a deceptive act. *However, the attorney general may seek to enjoin patterns of incurable deceptive acts with respect to consumer transactions in real property. In addition, the court may order that supplier to [sic] make payment of the money unlawfully received from the aggrieved consumers to be held in escrow for distribution to aggrieved consumers.*⁷⁹

The intent of this added language appears to be to restrict the type of suits in which the Attorney General may seek injunctions. In a real property transaction, an injunction may be sought only when there are "patterns of incurable deceptive acts."⁸⁰ An incurable deceptive act is a deceptive act that is part of a scheme, artifice, or device used with intent to defraud or mislead.⁸¹ Thus, before seeking an

⁷⁵See, e.g., *Herbert v. Stanford*, 12 Ind. 503 (1859) (recovery of purchase money paid is allowed when sale rescinded for fraud or misrepresentation); *Yost v. Shaffer*, 3 Ind. 331 (1852) (action for rescission is proper when vendor has been guilty of fraud); *Bolds v. Woods*, 9 Ind. App. 657, 36 N.E. 933 (1893) (action for damages permitted for misrepresentation by the vendor of land).

⁷⁶Act of Feb. 25, 1982, Pub. L. No. 152, 1982 Ind. Acts 1115.

⁷⁷IND. CODE § 24-5-0.5-2(1) (1982). See also *id.* § 24-5-0.5-2(4).

⁷⁸*Id.* § 24-5-0.5-4(a), (b).

⁷⁹*Id.* § 24-5-0.5-4(c) (emphasis added).

⁸⁰*Id.*

⁸¹*Id.* § 24-5-0.5-2(7).

injunction in real property transactions, the Attorney General must show a pattern of *intentionally* deceptive conduct. Apparently, in other transactions the Attorney General may seek an injunction without showing a pattern of deceptive conduct or without showing an intent to deceive. The added language also makes it clear that a court, at the request of the Attorney General, may order a supplier to make restitution of the money that was unlawfully received from aggrieved consumers. The money is to be held in escrow for distribution to aggrieved consumers. This relief appears to be available in all transactions and does not appear to be limited to real property transactions.

Finally, the Deceptive Consumer Sales Act was amended to add a new type of deceptive act to the long list of deceptive acts already found in the Act. It is now a deceptive act to represent that a "replacement or repair . . . is authorized by the consumer if the consumer has not authorized the replacement or repair, and if the supplier knows or should reasonably know that it is not authorized."⁸² This language gives the consumer a remedy in addition to the common law defense to an action for the price of the unauthorized repair work. In a suit for the price of unauthorized repairs, the consumer would have a defense based on the lack of authorization.⁸³ Now, in addition, the consumer will be able to claim that the unauthorized repair is a violation of the Deceptive Consumer Sales Act.

F. Amendments to Indiana's Uniform Consumer Credit Code

The 1982 Indiana General Assembly enacted some significant amendments to Indiana's version of the Uniform Consumer Credit Code (UCCC).⁸⁴ The purpose of these amendments is to remove some commercial transactions from coverage of the UCCC and to increase the permissible credit service charge that may be imposed in consumer credit transactions.

Although, in general, the UCCC was drafted to protect persons to whom credit is extended in consumer transactions,⁸⁵ some non-consumer transactions were included in the 1968 Official Text, which was adopted by Indiana.⁸⁶ As originally enacted, Indiana Code section

⁸²*Id.* § 24-5-0.5-3(a)(14).

⁸³*See* *Deck v. Jim Harris Chevrolet-Buick*, 386 N.E.2d 714 (Ind. Ct. App. 1979) (holding that the automobile dealer was limited to a \$50 recovery for a \$134.40 bill because the customer had agreed to pay only \$50 for the repair).

⁸⁴Act of Feb. 24, 1982, Pub. L. No. 149, 1982 Ind. Acts 1101. IND. CODE §§ 24-4.5-1-101 to -6-203 (1982) contain Indiana's version of the UCCC.

⁸⁵*See* IND. CODE § 24-4.5-1-102(2) (1982).

⁸⁶Act of Mar. 5, 1971, Pub. L. No. 366, 1971 Ind. Acts 1557. *See* U.C.C.C., 7 U.L.A. 253 (1978) for the 1968 Official Text.

24-4.5-2-602 identified and defined a "consumer related sale" and provided certain protection for the credit buyer in such sales.⁸⁷ Prior to the amendments, a consumer related sale was a sale not exceeding a price of \$25,000, that was to a person other than an organization, or that was secured by an "interest in a one or two family dwelling occupied by a person related to the debtor."⁸⁸ The protection for the debtor included limits on the permissible credit service charge. For example, in a consumer related sale "the parties may contract for the payment by the buyer of . . . a credit service charge not in excess of eighteen percent."⁸⁹ Similarly, Indiana Code section 24-4.5-3-602 identified a consumer related loan and provided the same protection for borrowers in those transactions.⁹⁰ The purpose of these provisions was to accord some protection to sole proprietors in small transactions, even though the credit sale or loan was not for a personal, family, or household purpose.⁹¹ The premise was that small business debtors needed the same protection as consumers in small transactions.

Apparently, this protection was unwise. Often, high risk business debtors were prevented from obtaining credit because financial institutions could simply not afford to extend credit within the limits permitted by the UCCC for consumer related sales or loans. Both small businesses and financial institutions argued that these small business purpose loans should be excluded from the restrictions of the UCCC.

The Conference of Commissioners on Uniform State Laws responded by omitting the concepts of consumer related sales and loans from the 1974 Official Text of the UCCC.⁹² The 1982 Indiana General Assembly also responded to this concern.⁹³ It amended Indiana Code section 24-4.5-1-202, the UCCC exclusion section, by adding language that excludes all credit sales and loans that are for other than personal, family, household, or agricultural purpose.⁹⁴ Now, *all* business or nonconsumer sales and loans, including those that fit the

⁸⁷See Act of Mar. 5, 1971, Pub. L. No. 366, § 3, 1971 Ind. Acts 1557, 1607.

⁸⁸IND. CODE § 24-4.5-2-602(1) (Supp. 1981) (current version at *id.* § 24-4.5-2-602(1) (1982)).

⁸⁹*Id.* § 24-4.5-2-602(2) (1976) (current version at *id.* § 24-4.5-2-602(2) (1982)). In addition, section 24-4.5-2-602(3) limits the credit service charge for consumer related sales made pursuant to a revolving charge to the same limit that applies to consumer sales that involve revolving charge accounts.

⁹⁰*Id.* § 24-4.5-3-602(2), (2.5) (1976) (current version at *id.* § 24-4.5-3-602(2) (1982)).

⁹¹See U.C.C.C. § 2.602 comment 1, 7 U.L.A. 393 (1978); IND. CODE ANN. § 24-4.5-2-602 comment 1 (West 1980); U.C.C.C. § 3.602 comment 1, 7 U.L.A. 472 (1978); IND. CODE ANN. § 24-5.5-3-602 comment 1 (West 1980).

⁹²The 1974 Official Text expressly provides for no limit on finance charges for nonconsumer credit transactions. U.C.C.C. § 2.601 & comment 1 (1974 version), 7 U.L.A. 695-96 (1978).

⁹³See Act of Feb. 24, 1982, Pub. L. No. 149, §§ 3, 6, 1982 Ind. Acts 1101, 1102, 1105.

⁹⁴Act of Feb. 24, 1982, Pub. L. No. 149, § 2, 1982 Ind. Acts 1101, 1102 (codified at IND. CODE § 24-4.5-1-202(7) (1982)).

definition of consumer related sales or loans, are outside the coverage of the UCCC.

Nevertheless, the Indiana Code sections dealing with consumer related credit sales and loans still have some application. To see how this may be so, it must be recognized that the credit sales and loans governed by the UCCC, generally, are those sales and loans made by persons who regularly extend credit. For example, Indiana Code section 24-4.5-2-104 provides that a consumer credit sale is a sale in which credit is granted by a person regularly engaged as a seller in credit transactions of the same kind.⁹⁵ Similarly, Indiana Code section 24-4.5-3-104 provides that a consumer loan is "a loan made by a person regularly engaged in the business of making loans."⁹⁶ Therefore, credit sales or loans made by persons not in the business of making sales or loans are *not* consumer credit sales or consumer loans, even if they are made for personal, family, or household purposes. In these transactions, the buyer or borrower would not have the benefit of the UCCC protections that are applicable to consumer credit sales or loans. It is in these transactions that the consumer related sale and loan provisions come into play. These transactions, although not within the definition of consumer *credit* sales or loans, may be within the definition of consumer *related* sales or loans. For the transactions to be considered "consumer related," the seller or lender is not required to be regularly engaged in that activity.⁹⁷

It should be noted that because business or nonconsumer credit sales and loans are fully excluded from the UCCC,⁹⁸ the consumer related credit sale and loan provisions will not apply to any business loans, but only to consumer credit sales and consumer loans that are made by persons who are not regularly engaged in the business of extending credit. These provisions will continue the protection provided by the UCCC for persons who borrow or receive extensions of credit in transactions that are made by casual lenders such as real estate brokers and some retail stores. This application of the UCCC provisions, however, has the possible vice of creating restrictions in small family loans in which the parties would not expect, or be likely to be aware of, the restrictions.

The other major change in the UCCC involves permissible credit service charges. Retailers had argued that high interest rates and inflation made the maximum rates permitted under the UCCC too restrictive. The Indiana General Assembly responded by providing increased flexibility in service charge rates.⁹⁹ Creditors will now be allowed to

⁹⁵IND. CODE § 24-4.5-2-104 (1982).

⁹⁶*Id.* § 24-4.5-3-104.

⁹⁷*See id.* §§ 24-4.5-2-602(1), -3-602(1).

⁹⁸*See supra* text accompanying note 94.

⁹⁹Act of Feb. 24, 1982, Pub. L. No. 150, §§ 1-7, 1982 Ind. Acts 1107.

impose finance charges that produce an annual percentage rate of twenty-one percent, or one and three-quarters percent monthly, on outstanding balances.¹⁰⁰ This increased flexibility has also been provided for deferral charges involving consumer related sales and loans,¹⁰¹ although, as mentioned above, the concept of consumer related credit will have a much narrower application.

¹⁰⁰IND. CODE §§ 24-4.5-2-207(3), -3-201(1), -3-201(4) (1982).

¹⁰¹*Id.* §§ 24-4.5-2-604(1)(b), -3-604(1)(b).