

CONSUMER TRANSACTIONS: MOVEMENT TOWARD A MORE PROGRESSIVE APPROACH

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As a general observation, the preceding year was not particularly good for consumers in the Indiana legislature and courts. While consumers scored a few victories in individual lawsuits, they were of minor importance to the legal community at large. Indiana continues to be a state in which consumer rights are not aggressively protected by statute or court decisions when compared with the progressive consumer movements in other states.

Nevertheless, the state witnessed a few important consumer developments in the last year. Several court decisions are worth noting not only for their resolution and application of substantive legal issues, but also as a study of how judges interpret consumer statutes and contracts, whether they look to the language of the text alone or extend the inquiry to other contextual factors. There were some significant legislative and regulatory developments as well. This Article highlights selected developments in five areas: (1) sales of goods and services to consumers, (2) debt collection practices, (3) short term or “payday” loans, (4) telecommunications, and (5) secured transactions under Revised Article 9 of the Uniform Commercial Code.

I. SALES OF GOODS AND SERVICES

In several cases involving consumers in Indiana, the consumer did not fare well. On the subject of attorney’s fees under the Indiana Deceptive Sales Act,¹ the court of appeals in *Missi v. CCC Custom Kitchens, Inc.*² affirmed a trial court’s denial of fees even though the consumer prevailed in the action. The Missi family sought damages from CCC alleging breach of warranty, fraud, breach of contract and deceptive acts following their purchase of custom-made cabinets. Despite the fact the Missis won a \$2500 judgment, the trial court denied their claim for fees under Indiana Code section 24-5-0.5-4(a), which provides that the court “*may* award reasonable attorney fees to the party that prevails.”³ The fee denial was affirmed on appeal. Applying the plain language of the law, Judge Brook stated that the award of attorney’s fees is discretionary under this law,⁴ and refused to hold that the trial court abused its discretion in

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1. IND. CODE §§ 24-5-0.5-1 to -12 (1998).

2. 731 N.E.2d 1037 (Ind. Ct. App. 2000).

3. *Id.* at 1041 (quoting IND. CODE § 24-5-0.5-4(a)) (emphasis added by court).

4. *See id.* (citing *Haltom v. Bruner & Meis, Inc.*, 680 N.E.2d 6, 9 (Ind. Ct. App. 1997) (stating term “may” in a statute ordinarily means permissive, discretionary)).

denying the fee request.⁵

The decision is unfortunate for consumers, although the fault lies not with the court but with the language of the statute. Some states' consumer protection statutes mandate the award of fees when the consumer prevails, and courts in other states have held that fees are mandatory even when the statutory language provides that the consumer "may sue and recover" reasonable fees.⁶ The *Missi* court followed Indiana precedent on this issue and provided yet another illustration of this important weakness in Indiana consumer law. Consumer cases often involve small amounts of money, and substantial obstacles face most consumers who wish to assert their legal rights. Nevertheless, these cases are important to the people directly involved in the dispute. If Indiana lawyers know that their right to statutory fees is uncertain, they will be less likely to accept consumer representation, even in a strong case. As a result, consumers are then left to represent themselves, most likely in small claims courts, if they have the ability and inclination to enforce their rights.

*Lehman v. Shroyer*⁷ illustrates an obstacle for consumers under the notice provision of the Deceptive Sales Act.⁸ Lehman had a dispute with Shroyer over Shroyer's work repairing and upgrading Lehman's swimming pool. Early in the dispute resolution process, both sides were represented by counsel. Letters were exchanged, and Shroyer ultimately filed an action against Lehman to recover his fee for services rendered on the pool. Lehman's answer contained counterclaims and affirmative defenses, including a claim that Shroyer violated the Deceptive Sales Act. Shroyer's answer to the counterclaim denied violating the statute.⁹

After a bench trial, the court concluded that Lehman's claim under the Deceptive Sales Act should be dismissed because Lehman did not give Shroyer proper advance notice of the statutory claim as required by Indiana Code section 24-5-0.5-5(a).¹⁰ Except in certain circumstances not applicable to the case,¹¹ the statute requires notice to the defendant before bringing a deceptive act claim as a means of facilitating pre-complaint settlements and giving the supplier a reasonable opportunity to remedy the problem. Judge Sullivan affirmed the decision on appeal, stating that "'a literal application of the notice provisions' is required."¹²

5. See *id.* (citing *In re Shaffer*, 711 N.E.2d 37, 41 (Ind. Ct. App. 1999) (awarding or denying attorney's fees can be reversed only upon a showing of abuse of discretion), *trans. denied*, *Shaffer v. Lung*, 726 N.E.2d 308 (Ind. 1999)).

6. See JONATHON SHELDON, NATIONAL CONSUMER LAW CENTER, UNFAIR AND DECEPTIVE ACTS AND PRACTICES § 8.6.3 n.348 (3d ed. 1991) (citing cases from Minnesota and Louisiana).

7. 721 N.E.2d 365 (Ind. Ct. App. 1999).

8. See IND. CODE § 24-5-0.5-5(a) (1998).

9. See *Lehman*, 721 N.E.2d at 366-69.

10. See *id.* at 368.

11. If the alleged statutory violation is an act done "as part of a scheme, artifice, or device with intent to defraud or mislead," then the consumer need not give advance notice before asserting a violation of the act. IND. CODE § 24-5-0.5-2(7) (1998).

12. *Lehman*, 721 N.E.2d at 369 (quoting *McCormick Piano & Organ Co. v. Geiger*, 412

As with the *Missi* case, this holding applied the statute consistent with its literal terms, but it illustrates another weakness in the law and a trap for the unwary consumer (or his counsel). In this instance, both parties were represented by lawyers during the dispute. Ample opportunity existed for discussing the particulars of the claims and settling the dispute prior to the lawsuit being filed. Moreover, Lehman did not rush to initiate the legal action, but rather responded to a collection action filed by his supplier. Interestingly, Shroyer's counsel did not even raise the notice issue in his answer to the deceptive act counterclaim. Thus, it appears that neither lawyer was aware of the notice requirement throughout the entire pre-lawsuit negotiating process as well as during the litigation phase. Under these circumstances, if Lehman had given Shroyer the required notice before making the counterclaim, it would have served no useful purpose. Nevertheless, the court applied the notice provision strictly and denied recovery.¹³

These two examples of judicial formalism suggest that Indiana judges are strict constructionists, inclined to side with their view of the "plain meaning" of words when deciding cases. While this might be true as a general statement, it is not always the case. A consumer in *Zawistoski v. Gene B. Glick Co.*¹⁴ lost a breach of warranty claim in a landlord-tenant context, when a literal application of the lease might have supported her claim. The plaintiff, a sixty-two-year-old resident in an apartment complex, tripped on a portion of raised sidewalk and fractured her neck. She brought an action alleging negligence and breach of contract/warranty against the landlord. The trial court dismissed the contract claim on summary judgment, and she lost at trial on the negligence claim.¹⁵

On appeal of the contract claim dismissal, the plaintiff argued that the lease had created a warranty or contractual obligation to keep the property in good, safe condition. Specifically, the lease provided that "[t]he Landlord agrees to . . . maintain the common areas and facilities in a safe condition."¹⁶ In affirming the dismissal of the contract claim, Judge Kirsch concluded that the lease did not create a warranty of safe conditions in the common areas. He reasoned that, when read in context, the contract provision did no more than restate the common law duty of the landlord to exercise reasonable care in maintaining the common areas in a reasonably fit condition. It did not warrant or guarantee that the grounds would be safe. In the court's view, if the landlord exercised reasonable care in maintaining the premises (as the jury so found on the negligence count),

N.E.2d 842, 849 (Ind. Ct. App. 1980)).

13. *See id.* In an attempt to ameliorate the harshness of the decision, the court addressed the merits of the Lehman's claim under the deceptive sales act and concluded that it was likely to fail in any event. *See id.* Of course, the trial court dismissed the claim without findings of fact, so the appellate court's conclusions are somewhat speculative and hardly a substitute for a complete factual inquiry below.

14. 727 N.E.2d 790 (Ind. Ct. App. 2000).

15. *See id.* at 792.

16. *Id.* at 793.

then no more would be required.¹⁷

While the decision is defensible, it could well have been decided otherwise. The lease, which was drafted by the lessor and therefore should be construed (if ambiguous) against its interest,¹⁸ stated unequivocally that the landlord would maintain common areas in a safe condition, not that it would make reasonable efforts to maintain a reasonable degree of safety. Judge Kirsch construed the lease favorably for the landlord, whereas other judges might not have been so forgiving. Lawyers should use caution when stating the landlord's obligations to ensure that the lease does no more than what is required by common law, unless a higher duty is intended.

The consumer fared better in *Mullis v. Brennan*,¹⁹ which involved a dispute between a home improvement contractor (Mullis) and homeowners (the Brennans). Mullis entered into a contract to build a room addition for the Brennans, but the Brennans soon complained about the quality of the work being performed. When Mullis failed to correct the problems, the Brennans withheld partial payment. Mullis then walked off the job, filed a mechanics lien and ultimately sued for his lost profits. The Brennans counterclaimed for their extra costs in completing the job with other contractors, damages for violating both the Indiana Home Improvement Contracts Act²⁰ and the Deceptive Sales Act,²¹ plus attorney's fees. The Brennans won on all counts at trial, and on appeal as well.²² The opinion of Judge Ratliff on appeal offered some important lessons for both consumers and home improvement contractors.

Mullis first contended that he should not be held personally liable because his business was incorporated. The court noted, however, that Mullis did not sign the contract in his capacity as agent for the corporation, and therefore he was individually liable.²³ The lesson here for small businesses is to be careful about the manner in which contracts are signed. If corporate obligations are intended, the agreement must be signed in the corporation's name, or at least in a representative capacity (e.g., John Doe, as agent for XYZ Corp.).²⁴

On a related issue, Mullis also contended that the trial court erred in determining that the mechanic's lien filed by his corporation against the Brennans was invalid. The trial court concluded that the lien was void because (1) the corporation did not provide any work and/or materials for the project, and (2) Mullis, not the corporation, was the party to the contract from which the

17. See *id.* at 794.

18. See, e.g., *Fresh Cut, Inc. v. Fazli*, 650 N.E.2d 1126, 1132 (Ind. 1995); *Lacy v. White*, 288 N.E.2d 178, 183 (Ind. App. 1972).

19. 716 N.E.2d 58 (Ind. Ct. App. 1999).

20. IND. CODE §§ 24-5-11-1 to -14 (1998).

21. *Id.* §§ 24-5-0.5-1 to -12.

22. See *Mullis*, 716 N.E.2d at 62.

23. See *id.* at 63.

24. See *Winkler v. V.G. Reed & Sons, Inc.*, 619 N.E.2d 597, 599 (Ind. Ct. App. 1993) (stating corporate officer signing in representative capacity is generally not liable for contract obligations incurred), *aff'd*, 638 N.E.2d 1228 (Ind. 1994).

claim against the Brennans arose. The appellate court agreed.²⁵ The only party who was entitled to file the lien was the actual contracting party, Mullis, not his corporation. Because the corporation filed the lien, the designation of the wrong claimant rendered the lien invalid.

Mullis further contended that the trial court erred in determining that he was liable for damages for breach of contract, arguing that the Brennans breached first by withholding payment. “The trial court found that the Brennans presented ‘overwhelming evidence’ to show that[, at the time the Brennans refused to pay,] Mullis was not performing his contract in a workmanlike manner and that the room addition was not structurally sound and free of substantial defects”²⁶ Additionally, the trial court found that the Brennans “continually and clearly expressed their concerns about problems with the foundation, the frame, the roof, and the generally poor workmanship.”²⁷ On appeal, Judge Ratliff noted that “[t]he law implies a duty in every contract for work or services that the work or services will be performed skillfully, carefully, diligently, and in a workmanlike manner,”²⁸ and observed that the term “workmanlike manner” is a term of art in the building trade that means: “To do the work in the building of a house in a good workmanlike manner is to do the work as a skilled workman would do it.”²⁹ Failure to perform in a workmanlike manner is a factual inquiry, and the record supported the trial court’s findings.

On the Brennans’ claim under the Home Improvement Contracts Act, the court sustained the trial court’s findings that Mullis violated the act in the following ways:³⁰

- a. The Contract did not contain the address of the home improvement supplier, Mullis, and did not contain each of the telephone numbers and names of any agent to whom consumer problems and inquiries could be directed.³¹
- b. The Contract did not contain the date that the home improvement contract was submitted to the Brennans and any time limitation on the Brennans’ acceptance of the Contract.³²
- c. The Contract did not contain a reasonably detailed description of the proposed home improvements.³³
- d. The Contract did not contain the approximate starting and completion

25. *See Mullis*, 716 N.E.2d at 63.

26. *Id.* at 64.

27. *Id.*

28. *Id.* (citing *Data Processing Servs., Inc. v. L.H. Smith Oil Corp.*, 492 N.E.2d 314, 319 (Ind. Ct. App. 1986)).

29. *Id.* (quoting *Morris v. Fox*, 135 N.E. 663, 664 (Ind. App. 1922)).

30. *See id.* at 65.

31. *Id.* (citing IND. CODE § 24-5-11-10(a)(2) (1998)).

32. *Id.* (citing IND. CODE § 24-5-11-10(a)(3) (1998)).

33. *Id.* (citing IND. CODE § 24-5-11-10(a)(4) (1998)).

dates of the home improvements.³⁴

e. The Contract did not contain a statement of any contingencies that would materially change the approximate completion date of the contract.³⁵

The court further noted that under section 24-5-11-14 of the Indiana Code, a home improvement supplier who violates the Act commits a deceptive act as well, actionable under the Deceptive Sales Act, which gives rise to a claim for attorney's fees.³⁶ Moreover, the Indiana Supreme Court has recognized that a "building contractor occupies a position of trust with" those whom he enters into a home improvement contract.³⁷ Because few consumers are knowledgeable about the home improvement industry, "consumers [must] rely on the expertise of the contractor."³⁸ Accordingly, courts in Indiana hold the contractor to a strict standard.³⁹ In light of these policies, and the combined acts of non-compliance with Mullis' statutory and contractual duties, the court of appeals affirmed the finding that Mullis committed a deceptive act, justifying an award of damages and attorney's fees for both trial and appellate expenses.⁴⁰

Another successful consumer action was *A.J.'s Automotive Sales, Inc. v. Freet*,⁴¹ which involved a falsified representation of an automobile's mileage at the time of sale. The Freet brought suit against a used car dealer and a prior owner of the vehicle, alleging violations of the federal Odometer Act⁴² and the Indiana Deceptive Sales Act, after learning that the 1984 Suburban they purchased actually had 180,788 miles on it when the odometer declaration said 80,788. The trial court issued an order rescinding the sales contract and requiring the defendants to pay damages.⁴³ On appeal, Judge Friedlander's opinion affirmed most of the trial court's rulings⁴⁴ and made several holdings of interest to consumers.

The court first held that the federal odometer statute applies not only to car dealers, but also to an individual who sells or trades a car to a dealer,⁴⁵ and that the individual in this case could be held liable for falsifying the actual mileage

34. *Id.* (citing IND. CODE § 24-5-11-10(a)(6) (1998)).

35. *Id.* (citing IND. CODE § 24-5-11-10(a)(7) (1998)).

36. *See id.* at 65 (applying IND. CODE § 24-5-0.5-4(a) (1998)).

37. *F.D. Borkholder Co. v. Sandock*, 413 N.E.2d 567, 571 (Ind. 1980).

38. *Mullis*, 716 N.E.2d at 65.

39. *See id.*

40. *See id.* at 66-67.

41. 725 N.E.2d 955 (Ind. Ct. App. 2000), *trans. denied*, No. 71A03-9909-CV-343, 2000 Ind. LEXIS 734, at *1 (Aug. 16, 2000).

42. Motor Vehicle Information & Cost Savings Act, 49 U.S.C. § 32701 (1997).

43. *See A.J.'s Auto. Sales*, 725 N.E.2d at 959.

44. *See id.* at 959, 970.

45. *See id.* at 962-63 (citing *Duval v. Midwest Auto City, Inc.*, 425 F. Supp. 1381, 1387 (D. Neb. 1977), *aff'd*, 578 F.2d 721 (8th Cir. 1978)).

in a suit brought by the subsequent purchasers of the vehicle.⁴⁶ Therefore, the trial court properly denied the previous owner's motion for summary judgment on the odometer claim. The court did conclude, however, that the previous owner could not be held liable under the Indiana Deceptive Sales Act, which only applies to "suppliers" of goods and services.⁴⁷ A "supplier" must "regularly engage[] in or solicit[] consumer transactions,"⁴⁸ and there was no evidence that the previous owner had done so in this instance.⁴⁹ Applying the "clear and unambiguous" language of the statute, the court dismissed the deceptive act claim.⁵⁰

II. DEBT COLLECTION

The U.S. Court of Appeals for the Seventh Circuit decided several debt collection cases over the past twelve months, clarifying some important issues for both consumer debtors and persons who engage in debt collection activities. The results for consumers were mixed.

In *Miller v. McCalla*,⁵¹ an individual took out a mortgage to purchase a house for personal use, but later converted the house to rental property. After the individual defaulted on the mortgage, a law firm representing the creditor sent him dunning letters that allegedly violated the federal Fair Debt Collection Practices Act⁵² by failing to state the amount of the debt. The district court granted summary judgment for the law firm on the ground that the debt was no longer a consumer debt and, therefore, the FDCPA did not apply.⁵³

The Seventh Circuit reversed. Judge Posner noted that there are no reported decisions squarely deciding this issue, but in looking at the language and general purposes of the statute, he concluded that the character of the loan at the time it was created should govern whether the FDCPA applies.⁵⁴ Resisting the opportunity to decide the case solely on a grammatical construction of the statute, Judge Posner observed, in rhetoric that might have been directed to the stronger textualists among his brethren, that "the purpose of statutory interpretation is to make sense out of statutes not written by grammarians."⁵⁵ The creditor is more likely to know the character of the loan (commercial or personal) at the outset of the transaction than at any subsequent time when the debtor may have changed the use of the property, so this construction of the statute will promote certainty

46. *See id.*

47. *Id.* at 964.

48. IND. CODE § 24-5-0.5-2(a)(3) (1998).

49. *See A.J.'s Auto. Sales*, 725 N.E.2d at 963-64.

50. *Id.* at 964 (citing *Campbell v. State*, 716 N.E.2d 577 (Ind. Ct. App. 1999)).

51. 214 F.3d 872 (7th Cir. 2000), *reh'g denied*, No. 98-C-5563, 2000 U.S. App. LEXIS 18232, at *1 (July 26, 2000) (en banc).

52. 15 U.S.C. § 1692 (1998).

53. *See Miller*, 214 F.3d at 874.

54. *See id.* at 876.

55. *Id.* at 874-75 (looking at the definitions of "debt" and "consumer").

as creditors decide when to comply with its mandates. In this case, the loan was a consumer transaction when it was made, and after its creation the debtor converted the property to an income-producing asset. The FDCPA therefore still governed the collection efforts despite the change in use.⁵⁶

The Seventh Circuit also decided an interesting issue concerning the scope of law firm liability under the FDCPA. The consumer had actually sued two law firms—one (organized as a limited liability company) that actually attempted to collect the debt by sending the dunning letters, and another firm in which the first LLC firm was a partner. Judge Posner observed that this was an unusual law practice structure, but concluded that both firms could be held liable under the statute, applying basic partnership law.⁵⁷ Unlike affiliated corporations, partnerships do not enjoy limited liability. The liability of a partnership is imputed to the partners, and so the consumer was entitled to sue the individual partners as well as the partnership.⁵⁸

The Seventh Circuit in *Pettit v. Retrieval Masters Creditors Bureau, Inc.*,⁵⁹ held that individual shareholders or officers of a corporate debt collector are not liable under the FDCPA regardless of how much day-to-day control they exercise over the operations of the company.⁶⁰ Unless the individual himself comes within the definition of “debt collector” under the statute, he cannot be held liable. The FDCPA applies the principle of vicarious liability, and the corporation is liable for the acts of its employees who violate the act. The court went so far as to state that “suits against the owners [or officers] of a debt collection company who are not otherwise debt collectors are frivolous and might well warrant sanctions.”⁶¹

An important part of the FDCPA is the requirement that notices not confuse debtors about certain rights they have under the law. The Seventh Circuit in *Walker v. National Recovery, Inc.*⁶² held that the question whether a notice is confusing is a question of fact, which can be explored by testimony and other evidence such as consumer surveys.⁶³ The court therefore held that a complaint alleging that a particular notice confused recipients may not be dismissed under Federal Rules of Civil Procedure 12(b)(6)—a complaint stating “‘this notice is confusing’ states a claim on which relief may be granted.”⁶⁴ The court reasoned that “district judges are not good proxies for the ‘unsophisticated consumers’ whose interests the statute protects.”⁶⁵ “Unsophisticated readers may require more explanation than do federal judges; what seems pellucid to a judge, a

56. *See id.* at 875.

57. *See id.* at 876.

58. *See id.*

59. 211 F.3d 1057 (7th Cir. 2000), *reh’g denied*, No. 98-C-1154, 2000 U.S. App. LEXIS 12848, at *1 (June 7, 2000) (en banc).

60. *See id.* at 1059.

61. *Id.*; *see also* *White v. Goodman*, 200 F.3d 1016, 1019 (7th Cir. 2000).

62. 200 F.3d 500 (7th Cir. 1999).

63. *See id.* at 501.

64. *Id.* (citing *Johnson v. Revenue Mgmt. Corp.*, 169 F.3d 1057 (7th Cir. 1999)).

65. *Id.* (citing *Johnson*, 169 F.3d at 1057).

legally sophisticated reader, may be opaque to someone whose formal education ended after sixth grade. To learn how an unsophisticated reader reacts to a letter, the judge may need to receive evidence.”⁶⁶

The *Walker* case is important to consumer lawyers who draft FDCPA claims, but it does not mean that every case alleging confusion in a dunning letter will survive a motion to dismiss. The extent of protection afforded the “unsophisticated” consumer in the Seventh Circuit is a subject of considerable discussion. In *Pettit*, Judge Manion wrote that the plaintiff must submit some credible evidence, other than speculating on how a naive debtor might interpret the communication, to survive a summary judgment motion.⁶⁷ In another recent Seventh Circuit decision, *White v. Goodman*,⁶⁸ Judge Posner wrote that while the FDCPA protects the unsophisticated debtor, it does not protect “the irrational one.”⁶⁹ The Act is not violated by a dunning letter that is allegedly confusing only when given “an ingenious misreading.”⁷⁰

While it may seem odd to ponder the difference between an “unsophisticated” consumer and an “irrational” one, the Seventh Circuit is attempting to send a message to the bar that FDCPA claims will be taken seriously in the Circuit, and that plaintiff’s lawyers will be given ample opportunity to make a case that a dunning letter or other communication from a debt collector is misleading. They cannot be lazy, however, and expect to get past summary judgment merely by arguing that some hypothetical consumer could possibly be misled by a creative, strained interpretation of the communication. They will have to present credible evidence, in the form of surveys, expert testimony or otherwise, to support their claim that an unsophisticated consumer might be misled.

Finally, the Seventh Circuit had occasion to resolve a difference of opinion among the district courts concerning the definition of “net worth” under the FDCPA. The act provides that “in the case of a class action, [the total recovery shall not] exceed the lesser of \$500,000 or 1 per centum of the net worth of the debt collector.”⁷¹ The statute does not define “net worth,” and one court defined the term as the book value of the company, i.e., assets listed on its balance sheet minus liabilities, sometimes called the “balance sheet net worth.”⁷² Another district judge reached a different conclusion and used the fair market value of the company, which would usually be higher because it would likely include the

66. *Id.* (quoting *Johnson*, 169 F.3d at 1060); see also *Marshall-Mosby v. Corporate Receivables, Inc.*, 205 F.3d 323, 326 (7th Cir. 2000) (reversing dismissal under FED. R. CIV. P. 12(b)(6)).

67. See *Pettit v. Retrieval Masters Creditors Bureau, Inc.*, 211 F.3d 1057, 1061 (7th Cir. 2000), *reh’g denied*, No. 98-C-1154, 2000 U.S. App. LEXIS 12848, at *1 (June 7, 2000) (en banc).

68. 200 F.3d 1016 (7th Cir. 2000).

69. *Id.* at 1020.

70. *Id.*

71. 15 U.S.C. § 1692k(a)(2)(B) (1998).

72. See *Sanders v. Jackson*, 33 F. Supp. 2d 693, 696 (N.D. Ill. 1998), *aff’d*, 209 F.3d 998 (7th Cir. 2000).

value of good will and other intangible assets.⁷³ In *Sanders v. Jackson*,⁷⁴ the Seventh Circuit held that book value was the appropriate measure of net worth, a decision that will reduce the limit for class action damages under the FDCPA in most instances. In the case before the court, the apparent book value of the defendant was only about \$100,000, but its fair market value was alleged to be \$1.8 million.⁷⁵

As a study of statutory interpretation, the *Sanders* opinion is interesting. The court began by inquiring about the “plain meaning” of the term, but concluded that “net worth” has no obvious, singular meaning even with the assistance of dictionary definitions.⁷⁶ It then considered how the term had been used in other statutes enacted by Congress, and noted that Congress had not defined the term in other statutes either.⁷⁷ The court finally decided the issue by looking at how other courts had defined “net worth” when interpreting other federal acts where the term was used, and saw that the term has usually been construed in accordance with generally accepted accounting principles (GAAP).⁷⁸ Noting that those statutes served significantly different purposes than the FDCPA, but not wanting to create a different definition of “net worth” just for debt collection cases, the court decided to follow those other decisions. Since GAAP provides that internally developed goodwill is not reported on a company’s financial statements, “net worth” for purposes of the FDCPA is limited to the book value of the company.⁷⁹

III. “PAYDAY” LOANS

The Indiana Office of Attorney General issued an opinion in January 2000, concluding that “payday” or “deferred-deposit” lenders violate Indiana law when they offer supervised loans with finance charges that exceed the annual percentage rates (APRs) set out in Indiana’s consumer credit code.⁸⁰ Finance charges that exceed the statutory caps outlined in the code are subject to refund. Moreover, a transaction is void and violates Indiana’s loansharking statute if the lender charges an interest rate greater than twice the rate authorized for finance charges in the code. The opinion noted, however, that no controlling Indiana authority exists on these issues, and that there is some “doubt” about how an Indiana court might resolve them.⁸¹

Under a typical payday loan, a lender signs a contract with a borrower, agreeing to take the borrower’s postdated check as collateral for a cash advance.

73. See *Scott v. Universal Fid. Corp.*, 42 F. Supp. 2d 837, 841 (N.D. Ill. 1999).

74. 209 F.3d at 998.

75. See *id.* at 1000.

76. See *id.* (looking at definitions in BLACK’S LAW DICTIONARY).

77. See *id.* at 1000-01.

78. See *id.* at 1001-02.

79. See *id.* at 1002.

80. Op. Ind. Att’y Gen. No. 2000-1, 2000 Ind. AG LEXIS 1, at *1 (Jan. 19, 2000).

81. See *id.*

The lender agrees not to deposit the check for a specified period of time, and pays cash immediately to the borrower. For example, to obtain a \$100 loan, the borrower might pay a thirty-three dollar finance charge and write a check for \$133 (or pay the thirty-three dollars in cash and write a check for \$100). The lender gives the borrower cash and agrees not to deposit the borrower's check for two weeks.

If, after two weeks, the borrower lacks sufficient funds to cover the check, she can "roll over" the loan by paying an additional "loan finance charge," thereby earning additional time to repay an even larger amount of money. In little time, this series of "charges" can amount to hundreds or even thousands of percentage points calculated on an annual basis. If these costs are deemed finance charges, they would ordinarily violate Indiana's loansharking statute. Lenders claim they are not finance charges and are expressly authorized by Indiana's consumer credit code.

An interpretive problem arises because Indiana's consumer credit code authorizes lenders of certain consumer loans to assess "a minimum loan finance charge of not more than thirty dollars."⁸² Separately, however, Indiana's loansharking statute makes it a crime to charge an interest rate greater than twice the rate authorized for finance charges in the consumer credit code.⁸³ For most payday loans, the loansharking statute would prohibit more than a seventy-two percent APR.

The legal question addressed in the attorney general's opinion is whether these statutes conflict or whether they can be reconciled. Using a traditional tool of statutory construction and attempting to give full effect to both statutes, the opinion concluded "that Indiana's consumer credit and loansharking statutes are not inconsistent and can be interpreted harmoniously."⁸⁴ Lenders may contract for and receive one or more thirty-three dollar loan finance charges, but the resulting APR cannot exceed the interest limit established in the loansharking statute.⁸⁵ The opinion reasoned that "[t]he General Assembly [] elected to exempt a discrete set of business practitioners from the state's interest and usury laws" (e.g., pawnbrokers), and payday lenders are not among the exempted parties.⁸⁶ Absent a statutory provision that expressly exempts payday lenders, their business practices are subject to Indiana's interest and usury laws.

Soon, this issue will be resolved in Indiana and in other states, possibly by the courts,⁸⁷ but more likely by the legislature.⁸⁸ Payday loans have become

82. IND. CODE § 24-4.5-3-508(7) (1998).

83. *See id.* § 35-45-7-2.

84. Op. Ind. Att'y Gen. No. 2000-1, 2000 Ind. AG LEXIS at *3.

85. *See* IND. CODE § 35-45-7-2 (1998).

86. Op. Ind. Att'y Gen. No. 2000-1, 2000 Ind. AG LEXIS at *5. *See also* IND. CODE §§ 28-7-5-28 to -29 (1998).

87. The Seventh Circuit has been seeing so many payday lender cases, many of which allege violations of the federal Truth in Lending Act, that it has designated a special panel to hear all appeals. *See Smith v. Check-N-Go of Ill., Inc.*, 200 F.3d 511, 516 (7th Cir. 1999) (circling due-date information on Truth in Lending Act form is not violation of conspicuous disclosure

immensely popular throughout the country, and may serve a legitimate purpose in the consumer credit market. If Indiana's usury limits apply to their "service charges," the industry might not be financially viable. The topic could warrant separate legislation designed to regulate the special characteristics of this type of consumer transaction, as the legislature did with rent-to-own contracts and other subject-specific laws.⁸⁹

IV. TELECOMMUNICATIONS

In a class action on behalf of telephone customers in five states including Indiana, consumers sued Ameritech Corporation alleging that the telephone service provider improperly used its monopoly power to engage in exclusionary practices that prevented competitors from entering the market, resulting in excessive costs to rate payers, in violation of the Sherman Act⁹⁰ and the Telecommunications Act of 1996.⁹¹ The plaintiffs were consumers of local telephone services in Ameritech's service area. When Congress enacted the Telecommunications Act, the consumers looked forward to the same kind of competition in the local services market that occurred several decades earlier in the telephone equipment and long distance markets. When this market penetration did not occur as the plaintiffs had hoped, they alleged that Ameritech was at fault by not taking adequate steps to facilitate entry.

Under the Telecommunications Act, Ameritech has special responsibilities as the local exchange carrier to cooperate with potential entrants who would like to break into the local services market. Believing that Ameritech was not adequately pursuing its obligations under the Act and unlawfully monopolizing under Section 2 of the Sherman Act, consumers filed a class action suit in 1997.

The district court for the Northern District of Illinois dismissed the case on the ground that the plaintiffs lacked standing under both laws. On appeal in *Goldwasser v. Ameritech Corp.*,⁹² the Seventh Circuit held that the plaintiffs did have standing as consumers to assert the claims, but that they failed to allege any wrongful conduct independent of Ameritech's failure to comply with the

requirements of the act). In November 2000, the Indiana Supreme Court accepted certification of the question from three federal district courts that were considering the legality of payday loans. *Livingston v. Fast Cash USA, Inc.*, 737 N.E.2d 1155 (Ind. 2000). The decision had not yet been rendered at press time.

88. Arkansas recently passed such a law. See Theo Francis, *Cashing in on Cash Advances*, ARK. DEMOCRAT-GAZETTE, July 16, 2000, at G1. California is considering bills as well. See Miguel Bustillo, *Lawmakers Push 2 Bills to Regulate "Payday Loan" Industry*, L.A. TIMES, May 17, 2000, at A24.

89. See, e.g., IND. CODE §§ 24-5-0.5 to -18 (regulating more than one dozen specific types of consumer transactions).

90. 15 U.S.C. §§ 1-3 (1997).

91. Pub. L. No. 104-104, 110 Stat. 56 (codified in scattered sections of 47 U.S.C. (1995)).

92. 222 F.3d. 390 (7th Cir. 2000).

requirements of the Telecommunications Act.⁹³ Moreover, since their request for damages under the Telecommunications Act was essentially a claim for improper overcharges (paying higher rates than they otherwise would have paid), the “filed rate doctrine” barred the court from re-examining the reasonableness of Ameritech’s rates that were filed with and approved by the governing regulatory agencies.⁹⁴ The result was that the dismissal was proper, and the class action failed.

V. SECURED TRANSACTIONS: SOME NEW RULES FOR CONSUMER DEBTORS UNDER UCC REVISED ARTICLE 9

In the Article 9 revision to the UCC, adopted by the Indiana legislature in the 2000 legislative session, some changes were made that affect consumer debtors, although the changes were not as important as they might have been.⁹⁵ Early in the drafting process, the National Conference of Commissioners for Uniform State Laws (NCCUSL) had considered adding two significant consumer protection provisions. One would have entitled a prevailing consumer to recover attorney’s fees if the secured party had provided by contract for recovery of its own attorney’s fees⁹⁶ (which is almost always the case in consumer credit contracts).⁹⁷ The proposal recognized that consumer credit contracts are contracts of adhesion. Since consumers cannot effectively negotiate for their own fee provisions, fairness demands that both parties (or neither party) should get attorney’s fees upon prevailing in a lawsuit. Consumer advocates contended that it was manifestly unfair for only the prevailing creditor to claim fees.

The second proposal would have provided a less onerous reinstatement right in cases where a consumer had paid most of the debt prior to the default, but could not tender the full amount (including accrued interest and the creditor’s collection costs) in a single payment thereafter.⁹⁸ Both of these proposed changes, and several other pro-consumer proposals, were ultimately rejected in the final NCCUSL draft.

One of the changes that made the final draft is a provision stating that a security agreement describing collateral only by “Article 9 type” is insufficient in consumer transactions when the collateral is “consumer goods” and certain “consumer investments.”⁹⁹ This means that the description of these types of

93. *See id.* at 398, 401.

94. *Id.* at 402.

95. For an excellent discussion of the implications of Revised Article 9 for consumer transactions, see Jean Braucher, *Deadlock: Consumer Transactions Under Revised Article 9*, 73 AM. BANKR. L.J. 83 (1999).

96. *See* Revised Article 9, Council Draft No. 3, Nov. 20, 1997, § 9-628. *See* Braucher, *supra* note 95, at 109.

97. *See* MICHAEL M. GREENFIELD, CONSUMER TRANSACTIONS 665 (3d ed. 1999).

98. *See* Revised Article 9, Council Draft No. 3, Nov. 20, 1997, § 9-622.

99. *See* U.C.C. Rev. § 9-108(e)(2) (2000). The consumer investments listed are securities entitlements, securities accounts or commodity accounts, and these terms are all defined. *See id.*

collateral must be more specific than “all of the debtor’s consumer goods and investments.” The consumer goods part of this rule does not add much to the law because the Federal Trade Commission’s Credit Practices Rule already makes taking nonpossessory, non-purchase security interests in many consumer goods an unfair trade practice, (with some types of consumer goods exempted).¹⁰⁰ Thus, any creditor taking a non-purchase money security interest in consumer goods must describe those goods specifically (e.g., the consumer’s television) to comply with the rule. In addition, Revised Article 9 provides that after-acquired property clauses referring to consumer goods are ineffective unless the debtor acquires rights in the goods within ten days after the secured party gives value.¹⁰¹ As a result of both of these laws, most security interests in consumer goods are purchase money security interests that secure only the item being purchased, and they will usually describe that particular item in the security agreement.

The new prohibition on collateral descriptions is more significant for consumer investments. Without it, creditors might take blanket security interests in a consumer’s investment property with such general language as “all securities entitlements, securities accounts and commodities accounts, now owned or hereafter acquired.” For consumer investments, Revised Article 9 now requires specific descriptions of the particular investment serving as the collateral.

Revised Article 9 also addresses an unanswered question under the Federal Trade Commission’s Holder in Due Course Rule.¹⁰² The rule is silent on the legal effect of a consumer credit contract that is required to contain the FTC notice (that any holder is subject to claims and defenses against the seller of goods or services), but does not. Under Revised Article 9, an assignee of such a contract will be subject to a consumer debtor’s claims and defenses, just as if the notice had been included.

Other provisions make worthwhile changes in notices that creditors are required to give consumer debtors. Revised Article 9 lists certain required information that must be included in the notice before collateral in a consumer-goods transaction can be sold.¹⁰³ Current Article 9 states that only “reasonable notification” must be sent “of the time and place of any public sale” or “of the time after which any private sale or other intended disposition is to be made.”¹⁰⁴ Revised Article 9 requires that the secured party also state that the consumer could be liable for a deficiency after the sale, and give a telephone number that the consumer can call to find out the amount that she must pay to redeem the collateral.¹⁰⁵ It also creates a “safe harbor” notice form that the creditor can use prior to a public sale, informing the consumer that she may attend the sale and bring bidders. The safe harbor form also explains that the consumer can get the

§§ 9-102(a)(15), 9-108(b), referring to current §§ 8-501, 8-102 (1995).

100. See 16 C.F.R. § 444.2(a)(4) (2000).

101. See U.C.C. Rev. § 9-204(b) (2000) (replacing U.C.C. § 9-204(2) (1995)).

102. See 16 C.F.R. §§ 433.2(a)-(b) (2000).

103. See U.C.C. Rev. § 9-614 (2000).

104. U.C.C. § 9-504(3) (1995).

105. See U.C.C. Rev. § 9-614(1) (2000).

property back by paying the full obligation before the secured party sells it (the redemption right).¹⁰⁶ These new requirements should provide the consumer debtor with more information about the significance of a disposition of collateral—that the disposition may not satisfy the debt in full and that afterwards, it will be too late to get the property back.

Revised Article 9 also requires an “explanation of calculation of surplus or deficiency,”¹⁰⁷ a new type of post-disposition notice in consumer-goods transactions. If the disposition of the collateral resulted in a surplus, the creditor must give notice of the calculation of the surplus before or when the creditor accounts to the debtor. If the disposition resulted in a deficiency, the creditor must give the notice when it first makes written demand for the deficiency after the disposition. A creditor who decides not to collect a deficiency would not have to send this notice. This will create a record showing whether the creditor has given the consumer any credits (e.g., for payments or credit for unused warranty time). In addition, the notice may provide an incentive for creditors to credit debtors a higher amount to avoid dealing with protests by debtors who otherwise might be surprised to see that their goods realized a low price at the repossession sale, and that the potential deficiency is large.¹⁰⁸

In addition to these changes applicable only to consumer debtors, two new rules in Revised Article 9 apply to all debtors but are particularly important for consumers. Revised Article 9 adopts a definition of “good faith” that includes not only “honesty in fact,” but also “the observance of reasonable commercial standards of fair dealing.”¹⁰⁹ This definition could lend some support to lender liability precedent that requires a secured party to act reasonably when declaring a default and accelerating a debt, though the impact in Indiana is less certain.¹¹⁰ The new statute also adds a provision dealing with a common problem: unreasonably low prices in dispositions of collateral to the creditor itself, a person related to the creditor, or a secondary obligor (e.g., a guarantor). If the sale price “is significantly below the range of proceeds” in a hypothetical disposition to a buyer unrelated to the creditor, then the surplus or deficiency will be calculated on the basis of a disposition to that hypothetical buyer.¹¹¹

106. *See id.* § 9-614(3).

107. *See id.* § 9-616.

108. The remedy for noncompliance with the new requirement of notice of calculation of surplus or deficiency does not include statutory damages, however. In fact, a secured party is not liable at all for failing to send these notices unless the failure is “part of a pattern, or consistent with a practice, of noncompliance,” in which case there is liability for \$500. *Id.* § 9-625(e)(5).

109. *Id.* § 9-102(43) & cmt. 19.

110. *See, e.g.,* *Duffield v. First Interstate Bank of Denver*, 13 F.3d 1403 (10th Cir. 1993); *K.M.C. Co. v. Irving Trust Co.*, 757 F.2d 752 (6th Cir. 1985); *Alaska Statebank v. Fairco*, 674 P.2d 288 (Alaska 1983) (recognizing good faith requirement for lenders).

111. U.C.C. Rev. § 9-615(f)(2) (2000).

CONCLUSION

Although the Indiana courts and legislature were relatively quiet in addressing consumer issues in the year 2000, there are some important matters lurking on the horizon. The payday loan controversy will continue, with the legislature likely to face the issue in the next session. Revised Article 9 will also raise some questions as it takes effect and generates litigation over its meaning and function. Article 2, dealing with the sale of goods, is also under revision and will create its own interpretive problems for consumers and other buyers who are subject to its provisions. Thus, there is much to anticipate in the years to come.