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An Emerging Concept: Consumer Protection in Statutory Regulation, Products Liability, and the Sale of New Homes

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AN EMERGING CONCEPT: CONSUMER PROTECTION IN STATUTORY REGULATION, PRODUCTS LIABILITY AND THE SALE OF NEW HOMES

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INTRODUCTION

The field of law relating to a seller or manufacturer's liability for defective products has been expanding so greatly that it is no longer possible to comprehensively analyze those developments in a short work. For the purposes of this article, only certain aspects of product liability will be covered, including especially the recent consumer legislation enacted by Congress[1] and the growing application of a warranty of habitability in new home sales. In that field, just in the past ten years there has been tremendous change. With the *Schipper v. Levitt and Sons*[2] decision in 1965, the Supreme Court of New Jersey dramatically overruled 450 years of precedent. What is even more remarkable is that this was done by a unanimous decision. The court's opinion holds that when a new house is sold by the builder-vendor there is an implied warranty of habitability. Until that time, the courts had been uniform in refusing to read any implied warranty into the contract for the sale of a house. If the warranty was not expressly stated in the deed, it did not exist. However, since the *Schipper* decision, so many jurisdictions have followed the lead of New Jersey that it may soon become the majority rule.

A further advance has been made in consumer protection which may be even more significant than the *new house* warranty of habitability. That is, the extension of the warranty of habitability to

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1. It is known as the Consumer Product Warranty and Federal Trade Commission Improvements Act, 15 U.S.C. §§ 2301 et seq. (1975).

2. 44 N.J. 70, 207 A.2d 314 (1965).

apartments and apartment dwellings, as exemplified by *Javins v. First National Realty Corporation*.[3] This will be discussed in some detail later.

EROSION OF THE PRIVITY OF WARRANTY REQUIREMENT

The concept of products liability started as far back as 1842 with the classic case of *Winterbottom v. Wright*.[4] The court in England concluded that since there had been no privity of warranty between the stagecoach driver and the persons making repairs to the coach, Winterbottom would not be allowed to bring his action. Thereupon, the courts in the United States followed this precedent and declined to allow recovery where defective products had caused personal injury unless there had been privity of warranty.

This approach has gradually been discarded, the first significant case being *Klein v. Duchess Sandwich Company*[5] in 1937. Here a husband—one might say a doting husband—decided that his wife, being hungry, should have a sandwich. He bought her a ham and cheese sandwich, but unfortunately when the wife bit into the sandwich, it was crawling with maggots. Mrs. Klein immediately became very ill; she was nauseated (which is understandable) with the end result that she could not see a ham and cheese sandwich thereafter without recurring regurgitation.

When the action was brought the defense was immediately interposed that there was no privity between Mrs. Klein and the sandwich company, since it was the husband who had bought the sandwich. However, the California Supreme Court concluded that since this was a matter of food for human consumption, it was high time that any defense of lack of privity of warranty should be discarded. The court did indeed discard the privity requirement and soon other jurisdictions followed suit. Today there are virtually no jurisdictions where injuries resulting from food or beverage sales are subject to the lack of privity defense.

One of the last jurisdictions where this defense could have been interposed was Pennsylvania. Here a very significant and rather interesting situation was presented by *Hochgertel v. Canada Dry Corporation*.[6] In the *Hochgertel* case, the Eagles Club of Pitt-

3. 428 F.2d 1071 (D.C. Cir. 1970).

4. 10 Mees. & W. 109, 11 L.J. Ex. 415, 152 Eng. Rep. 402 (Ex. 1842).

5. 14 Cal. 2d 272, 93 P.2d 799 (1939).

6. 409 Pa. 610, 187 A.2d 575 (1963), criticized in Jaeger, *Privity of Warranty: Has the Tocsin Sounded?*, 1 DUQ. U.L. REV. 1 (1963).

sburgh, Pennsylvania, purchased a bottle of soda water from the Canada Dry Corporation, to be used in the bar tended by George Hochgertel. George placed this bottle of Canada Dry soda water on the shelf behind the bar and it later exploded. Bits of glass peppered George precipitating his cause of action.

The significance of this case lies in the fact that the Pennsylvania Supreme Court decided to recognize the defense of lack of privity of warranty stating that the remedy that George Hochgertel must seek would have to sound in tort, not in warranty. However, since that time, in *Kassab v. Central Soya*,[7] the Pennsylvania Supreme Court appears to have regretted its earlier decision and evidenced an inclination to rejoin the Union by eliminating lack of privity as a defense.

Along with the food and beverage cases, the law of product liability developed through a series of other situations initially in the category of cosmetics, drugs and detergents. These products, employed either for internal consumption or external application, have become a fertile source of litigation. Among the intriguing cases is *Rogers v. Toni Home Permanent*,[8] in which a lady received a permanent wave. The lotion was such that she acquired a cosmetic crew cut. The court held that a buyer was entitled to recover for breach of an express warranty from the manufacturer, notwithstanding lack of privity.

In the automotive products cases, as well as where food, beverage, cosmetics, drugs and the like are involved, a recovery may now be had without regard to privity. Automobiles and automotive products furnish a series of decisions, but it is unnecessary to go back to *MacPherson v. Buick Motor Company*[9] because that was basically tort law and for the moment, at least, warranties are the topic of discussion. *Henningsen v. Bloomfield Motors*,[10] a unanimous decision by the Supreme Court of New Jersey

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7. 432 Pa. 217, 246 A.2d 848 (1968), and discussed in Jaeger, *The Warranty of Habitability* (pt. 1), 46 CHI-KENT L.R. 123, 147ff (1969).

8. 105 Ohio App. 53, 139 N.E.2d 871 (1957).

9. 217 N.Y. 382, 111 N.E. 1050 (1916).

10. 32 N.J. 358, 161 A.2d 69 (1960). The *Henningsen* case has also been analyzed by this author in Jaeger, *Privity of Warranty: Has the Tocsin Sounded?*, 1 DUQ. U.L. REV. 1 (1963); Jaeger, *Warranties of Merchantability and Fitness for Use*, 16 RUTGERS L. REV. 493 (1962); and 5, 8 WILLISTON, CONTRACTS §§ 643, 995A (3d ed. Jaeger 1964).

in 1965, is a forerunner of the *Schipper* case and an indication of the rather liberal approach adopted by the court. To recall briefly the facts in *Henningsen*, a husband bought his wife a Plymouth automobile, very touchingly, for Mother's Day. However, when driven by Mrs. Henningsen from Asbury Park to Bloomfield, New Jersey, the Plymouth—with less than 500 miles on the odometer—failed to respond to the operation of the steering wheel. When the automobile encountered a curve, it elected to go straight ahead instead of following the road. A wall obstructed the progress of the Plymouth and it was a total wreck. It developed that Mrs. Henningsen was injured and badly shaken. In the course of the ensuing suit lack of privity was interposed as a defense to her action by both the Chrysler Corporation and Bloomfield Motors.

In an extensive and elaborate opinion by Mr. Justice Francis, the Supreme Court of New Jersey stated that privity of warranty would no longer be considered a valid defense in products liability cases and rendered judgment for Mrs. Henningsen. The court stated that certain types of warranty are against public policy. Justice Francis took occasion to state that when warranties are not conformable to the public interest, the courts will not enforce them.

Here the sales contract imposed limitations on the extent of the warranty which stated that unless the accident had occurred within a certain number of miles, or unless it happened within a certain time, the company would not be liable. In any event, the manufacturer would not be liable unless the defective parts were returned to the factory. The trouble was that the defective parts were no longer extant—they had become extinct. Justice Francis simply said that this type of warranty would not be enforced since it was contrary to public policy.

Proceeding to an examination of cases dealing with automotive accessories, a leading precedent is *B.F. Goodrich v. Hammond*,[11] which has some elements of macabre humor. Mr. Hammond had just bought four new Lifesaver tires from the B.F. Goodrich Company, when he and Mrs. Hammond drove their car to a funeral. On the way back, one of the Lifesaver tires exploded and both occupants, Mr. and Mrs. Hammond, were killed. When the next of kin brought this action the defense was lack of privity.

The court refused to permit this defense to prevail in situations such as this and considered the sales warranty breached and

11. 269 F.2d 501 (10th Cir. 1959), discussed in 8 WILLISTON, CONTRACTS § 998B (3d ed. Jaeger 1964).

granted judgment for the plaintiffs. Thus, consumer protection was extended to automotive accessories.

The same rules apply to general mechanical defects. When considering injury or death due to a mechanical defect in a component of a machine, courts have not been adverse to finding the seller or operator of the entire machine liable for either breach of duty or warranty even though the seller or operator did not manufacture the defective component. An example of the application of this rule is the classic case of *Goldberg v. Kollsman Instrument Company*.[12] In this New York case, American Airlines was operating the aircraft in which Mrs. Goldberg was killed. Although Kollsman Instrument Company had supplied the altimeter that was defective, American Airlines was held liable because American was responsible for the entire aircraft and its safe operation. Again, privity of warranty was not deemed essential and Chief Judge Desmond of the New York Court of Appeals expressly declared that whether the court was dealing with a breach of warranty or strict liability in tort,[13] recovery could be had.

Another case resembles this in regard to an automobile, *Ford Motor Company v. Mathis.*[14] A young man named Mathis was driving a Ford automobile along a road after dark and the light switch which controlled the upper and lower beam failed. When he attempted to put on the high beam, he was in total darkness. This was a most unfortunate development because his automobile encountered a tree which proved sturdier than the Ford. Great damage to the automobile resulted and the court gave judgment to the plaintiff against the Ford Motor Company even though the light switch was manufactured by an independent supplier.

Defects in a wide variety of miscellaneous products have resulted in extensive litigation.[15] In the case of *Morrow v. Caloric Appliance Corporation*,[16] a young lady, a guest in the home, was using the gas range which exploded—much to her surprise and consternation. Once again, since she had not purchased the gas range, the attempt was made by the vendor-manufacturer to interpose lack

12. 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963).

13. *See* 12 N.Y.2d at 437, *citing* Jaeger, *Privity of Warranty: Has the Tocsin Sounded?*, 1 DUQ. U.L. REV. 1 (1963).

14. 322 F.2d 267 (5th Cir. 1963).

15. *See* 8 WILLISTON, CONTRACTS § 996 (3d ed. Jaeger 1964).

16. 372 S.W.2d 41 (Mo. 1963), discussed in 8 WILLISTON, CONTRACTS § 996 (3d ed. Jaeger 1964).

of privity as a defense. The Missouri Supreme Court refused to accept this as a proper defense.

Peterson v. Lamb Rubber Company[17] represents a typical situation of a defective grinding wheel. There have been a number of grinding disc cases where the wheels have disintegrated seriously injuring the users. The courts in these cases have refused to permit lack of privity to be interposed as a defense.

Two further developments of much more recent origin have been adding grist to the mill of the lawyers. The two developments which practicing attorneys must follow are:

1. *Injury to the Bystander* – Totally innocent, minding his own business, a bystander is suddenly struck down by an errant truck tire that has left its truck or trailer, thus injuring him. Is there a good reason for denying recovery under these circumstances? Thus far the courts have not been inclined to permit recovery; but now several jurisdictions do give a remedy under such circumstances. It is highly illogical not to permit recovery if this particular injury can be anticipated, and if the tire or other product is defective, it can readily be anticipated that someone will be hurt. Why limit it to the purchaser or to someone who is using it with the permission of the purchaser?

At least three jurisdictions have expressly declared that there is no reason why the innocent bystander should not be protected from defective products. In *Johnson v. Standard Brands*,[18] a ladder was supposed to stand up; instead, it fell down. This conduct was considered inappropriate for a ladder. *Piercefield v. Remington Arms*[19] was a case in which the breech of a shotgun exploded injuring a bystander. In *Cintrone v. Hertz*,[20] a bystander was injured by a defective truck. In each case, the bystander's action was allowed.

2. *Property Damage* – The other developing concept is damage to property caused by a defect. The courts have been fairly uniform in saying that when there is injury to a person using the product, there should be recovery. But the courts have been reluctant to so hold where the damage is to property rather than to the person. However, in *Santor v. Karagheusian*,[21] when a newly pur-

17. 54 Cal. 2d 339, 353 P.2d 575, 5 Cal. Rptr. 863 (1960), discussed in 8 WILLISTON, CONTRACTS § 996 (3d ed. Jaeger 1964).

18. 274 Cal. App. 2d 331, 79 Cal. Rptr. 194 (1969).

19. 375 Mich. 85, 133 N.W.2d 129 (1965).

20. 45 N.J. 434, 212 A.2d 769 (1965).

21. 44 N.J. 52, 207 A.2d 305 (1965).

chased carpet proved defective, the New Jersey Supreme Court held in favor of recovery. Why should recovery be limited to injuries to people? Why not extend it to property damage? This is what was done. In *Randy Knitwear v. American Cyanamid Company,*[22] the product was a fabric which was supposed to be shrink proof, but far from being shrink proof, it shrunk appreciably—had bikinis been made of this material, disaster would have resulted.

Finally, the classic Michigan precedent, *Spence v. Three Rivers Builders and Masonry Supply,*[23] must be considered. A contractor built a summer home for his customer; certain cinder blocks were installed therein. After the house was completed the contractor departed for parts unknown and could not be reached. Later great big red splotches resembling blood appeared all over the walls, and the cinder blocks began to fall apart. The owner, Mrs. Spence, proceeded against the supplier of the cinder blocks, the Three Rivers Builders and Masonry Supply Company. Here again the question was one of privity.

The Michigan Supreme Court, by a closely divided (8 to 7) decision, decided that even though there was no privity and even though there was no personal injury to Mrs. Spence, except perhaps to her pocketbook, there should be recovery because the court found that bleeding, crumbling cinder blocks were really not appropriate for building a summer home.

Another intriguing case of far more recent vintage, *Kassab v. Central Soya,*[24] involved defective cattle feed. Various chemical compounds were added to cattle feed to make the cattle fatter and fatter so they could command better and better prices. But the addition of these chemicals also caused the animals to become sterile. This was a deep disappointment to some animals as well as to their owners. Recovery in damages was granted.

UNIFORM COMMERCIAL CODE WARRANTIES FOR CONSUMER PROTECTION

The Uniform Commercial Code embodies a number of implied warranties. Among them is the warranty of title, which results

22. 11 N.Y.2d 5, 181 N.E.2d 399, 226 N.Y.S.2d 363 (1962), discussed in 8 WILLISTON, CONTRACTS §§ 995, 998 A&B (3d ed. Jaeger 1964).

23. 353 Mich. 120, 90 N.W.2d 873 (1958), discussed in Jaeger, *Privity of Warranty: Has the Tocsin Sounded?*, 1 DUQ. U.L. REV. 1 (1963), and 8 WILLISTON, CONTRACTS § 996 (3d ed. Jaeger 1964).

24. 432 Pa. 217, 246 A.2d 848 (1968).

merely from the sale of a a chattel, whereby the vendor assures his purchaser that he has a right to sell the chattel and that the purchaser will remain undisturbed in the possession and enjoyment of that chattel.[25]

The warranties of quality are more significant. These include express warranties which are simply made in so many words.[26] Implied warranties existed at common law, starting with the case of *Stuart v. Wilkins*[27] which goes back to 1778, where the warranty had both a contractual and tort aspect. That was 200 years ago; since then, the warranty that has emerged in connection with the contract of sale of goods has retained this double aspect—even more so since the advent of strict liability.

The Code took over the two principal types of warranty, the warranty of merchantability and the warranty of fitness for use, and embodied them in sections 2-314 and 2-315.[28] A disclaimer provision appears in section 2-316 and very definitely requires that any disclaimer must be sufficiently conspicuous to come to the attention of the buyer.

The next topic, strict liability, will be discussed briefly. It has become apparent from the decision of the courts, especially in the case of *Manzoni v. Coca-Cola Bottling Works*,[29] that it is not at all amiss to join various counts in contract and tort in pleading a products liability case, so that the court can decide which one it likes best; courts do have a preference in these matters. In obliging the courts, the attorney will oblige his clients.

Limited Availability of Strict Liability

The emergence and development of strict liability has been one of the greatest steps in consumer protection. However, lest this point be overlooked, there is the question of the application of the statute of limitations. It assumes vital significance because normally, in most jurisdictions, the statute of limitations covering torts is substantially shorter than that covering contracts. Consequently, it may be essential to plead breach of warranty is the statute of limitations on the tort (negligence or strict liability) has run.

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25. U.C.C. § 2-312.

26. U.C.C. § 2-313.

27. 1 Dougl. 18, 99 Eng. Rep. 15 (K.B. 1778).

28. *See generally* U.C.C. Article 2 on Sales, *and especially* the Comments to Sections 2-314 and 2-315.

29. 363 Mich. 235, 109 N.W.2d 918 (1961).

This was exactly the case in *Mendel v. Pittsburgh Plate Glass Company.*[30] In *Mendel*, a woman in Rochester, New York, ran into a plate glass door of the Rochester Trust Company. The glass was so transparent that she didn't observe that it was really a door; she thought she was walking through space. To her misfortune, she learned otherwise when the glass broke, and she was cut. Before the action was actually brought, the statutory period for tort actions had passed. Thereupon, it was decided by the New York Court of Appeals that the action for damages based on breach of warranty could be maintained and that the contract statute of limitations had not run. This is a further reason for joining counts in contract and tort since the statute of limitations may have a controlling effect on the court's decision.

THE WARRANTY OF HABITABILITY

The warranty of habitability, the second major part of this article, is of recent origin. It began with the New Jersey Supreme Court's unanimous decision in *Schipper v. Levitt and Sons.*[31] An international builder of residential housing developments, the defendant company built Levitt Town in New Jersey. In one of the homes the failure to install a mixing valve (which would have cost $2.85) resulted in scalding steam emerging from the hot water tap which burned the hand, wrist and forearm of an infant. The child was hospitalized for more than two months. The defendants argued that since the minor was not in privity and his parents were tenants of the people who had bought the home, privity was twice removed; in fact, no privity was discernible anywhere. This was one defense interposed by Levitt and Sons; a further defense—one that might have been expected—was that no warranty had been expressly stated in the deed. Because at common law there were no implied warranties in the sale of a house, there was simply no warranty whatsoever.

Thus the court was confronted with two previously viable defenses. First, there is no implied warranty; and second, even if there were one, privity would be lacking. The unanimous opinion of the Supreme Court of New Jersey delved extensively into the necessity for having implied warranties in sales of new houses by the builder-vendor. The court noted that defense attorneys quoted the revised, 1936 edition of Williston on Contracts accurately, but

30. 25 N.Y.2d 340, 253 N.E.2d 207, 305 N.Y.S.2d 490 (1969).
31. 44 N.J. 70, 207 A.2d 314 (1965).

that the 1963 third edition states in Section 926A[32] that it would be far better if there were implied warranties of habitability in the sale of houses; such warranties would prevent shoddy and poor construction of houses and the unfortunate consequences resulting therefrom.

Quoting the third edition of Williston,[33] the court held that it was high time to overrule 450 years of real property precedents and decided the case on a breach of contract basis. Both defenses were rejected, and thus began the modern concept of the warranty of habitability. Since that time, the principle of an implied warranty of habitability has been adopted in at least eighteen jurisdictions.[34] It is probable that before long, it will represent the majority view.

In a most remarkable case, *Connor v. Great Western Savings and Loan Association*,[35] new houses slid downhill as they were built. The builders disappeared, and the Supreme Court of California held the financing institution liable. To hold the institution that financed the sale of the houses liable is an amazing development. The California court said that the defendant corporation was fully acquainted with the entire building project and was closely associated with the whole transaction. Nowhere but in California has this occurred. It seems highly doubtful that any other jurisdiction will follow this case.

Defects in apartments are also occupying the attention of the courts. These newer cases refer to rented property, rented

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32. 7 WILLISTON, CONTRACTS § 926A at 802-818 (3d ed. Jaeger 1963).

33. *Id.* at 818.

34. Arkansas, Wawak v. Stewart, 247 Ark. 1093, 449 S.W.2d 922 (1970), quoting 7 WILLISTON, CONTRACTS § 926A (3d ed. Jaeger 1963), and discussed in Jaeger, *The Warranty of Habitability* (pt. 1), 46 CHI.-KENT L.R. 123 (1969), and (pt. 2), 47 CHI.-KENT L.R. 1 (1970); California, Connor v. Great Western Savings & Loan Association, 69 Cal. 2d 850, 447 P.2d 609, 73 Cal. Rptr. 369 (1968); and Kriegler v. Eichler Homes, Inc., 269 Cal. App. 2d 224, 74 Cal. Rptr. 749 (1969); Colorado, Carpenter v. Donohoe, 154 Colo. 78 388 P.2d 399 (1964); Idaho, Bethlahmy v. Bechtel, 91 Idaho 55, 415 P.2d 698 (1966); Illinois, Weck v. A.M. Sunrise Construction Co., 36 Ill. App. 2d 383, 184 N.E.2d 728 (1962); Kentucky, Crawley v. Terhune, 437 S.W.2d 743 (Ky. App. 1969); Louisiana, Sikes v. B. & S., Inc., 164 So. 2d 81 (La. App. 1964); Michigan, Weeks v. Slavick Builders, 24 Mich. App., 621, 180 N.W.2d 503 (1970); Oklahoma, Jones v. Gatewood, 381 P.2d 158 (Okla. 1963); Oregon, Caldwell v. Wells, 288 Ore. 389, 365 P.2d 505 (1961); Rhode Island, Henry v. John Eshelman & Sons, 99 R.I. 518, 209 A.2d 46 (1965); South Dakota, Waggoner v. Midwestern Development, Inc., 83 S.D. 57, 154 N.W.2d 803 (1967), quoting 7 WILLISTON, CONTRACTS § 926A (3d ed. Jaeger 1963); Texas, Humber v. Morton, 426 S.W.2d 554 (Tex. 1968); Vermont, Rothberg v. Olenik. 128 Vt. 306, 262 A.2d 467 (1970); Washington, House v. Thornton, 76 Wash. 2d 428, 457 P.2d 199 (1969).

35. 69 Cal. 2d 850, 447 P.2d 609, 73 Cal. Rptr. 369 (1968).

premises, and the landlord-tenant relationship. In a 1961 case, *Pines v. Perssion*,[36] the Wisconsin Supreme Court held that there was no good reason for not holding the landlord liable when the premises were untenantable.

In 1970, *Javins v. First National Realty Corporation*[37] was decided. *Javins* concerned the area where the greatest development can be expected—rental properties. In the *Javins* case, there were violations of the District of Columbia Building Code as a result of which Javins declined to pay rent. Until this time, the obligation to pay rent and the obligation to make repairs had always been deemed independent covenants; that is what the original English case of *Maken v. Watkinson*[38] held. They were independent covenants and would sustain an action for breach of either, but they were not dependent or conditional covenants, and therefore neither party had a right to withhold performance in response to the other's breach.

Javins changed that principle by holding that where the premises are uninhabitable the tenant may withhold rent. *Pines v. Perssion*[39] only held that where repairs were not made the tenant could leave and reclaim his deposit. *Javins* thus goes beyond *Pines* and simply stands for the idea that until repairs are made there is no obligation to pay rent. In *Marini v. Ireland*,[40] the Supreme Court of New Jersey held that if, within a reasonable time after being notified, the landlord failed to repair a leaking faucet and exterminate rats in the basement, the tenant could make the repairs and deduct the amount therof from the rent.

An Illinois case, *Jack Spring, Inc. v. Little*,[41] held that when violations of the building code of Chicago existed, the tenant could refrain from paying rent and could not be evicted therefor. The great majority of jurisdictions that have adopted the warranty of habitability have limited its application to new houses sold by the builder-vendor or by someone on his behalf. That is the general limitation today, though there is a discernible trend to enlarge this liability to leased homes thus creating greater consumer protection.[42]

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36. 14 Wis. 2d 590, 111 N.W.2d 409 (1961).
37. 428 F.2d 1071 (D.C. Cir. 1970).
38. L.R. 6 Exch. Ch. 25 (1870).
39. 14 Wis. 2d 590, 111 N.W.2d 409 (1961).
40. 56 N.J. 130, 265 A.2d 526 (1970).
41. 50 Ill. 2d 351, 280 N.E.2d 208 (1970).
42. It is important to note here that Indiana is in the forefront among the states in protecting purchasers of houses. It implied a warranty of fitness for habita-

FEDERAL REGULATION: THE CONSUMER PRODUCT WARRANTY ACT

An examination of the Consumer Product Warranty and Federal Trade Commission Improvements Act of 1975[43] shows a far-reaching congressional intent to protect consumers. The Act regulates written warranties and service contracts entered into by manufacturers and suppliers.

The statute's definition of "warranty" is most significant. Warranty is defined as:

1. Any affirmation of fact;
2. Promise; or
3. Undertaking in *writing* which becomes part of the basis of the bargain between the supplier and the purchaser.

A significant point is that the warranty may be in the form of an advertisement. This leads to the suggestion that corporate clients who are selling chattels might be well-advised to review with their attorneys what they are saying in their advertisements. The Act goes on to define the deceptive warranty which is expressly prohibited. The "deceptive warranty" is one which:

1. Contains an affirmation of fact, a false or fraudulent representation or promises or descriptions which would mislead a reasonably prudent person;

2. Fails to contain sufficient information to prevent its terms from being misleading;

3. Uses the terms guaranty or warranty when other terms purport to limit the breadth, extent or scope of the protection apparently granted so as to deceive reasonable people. When one part of the warranty looks very comprehensive, but elsewhere a limitation on the extent and breadth of the warranty is introduced it is a violation of the Act.

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tion by the builder-vendor to the purchaser of a new house in Theis v. Heuer, 149 Ind.App. 52, 270 N.E.2d 764 (1971), *transfer granted and opinion adopted* 280 N.E.2d 300 (1972). Then in Barnes v. MacBrown and Company, Inc., ____ Ind. ____, 342 N.E.2d 619 (1976), the Supreme Court of Indiana extended this implied warranty to second and subsequent house purchasers, refusing to treat the sale of real estate differently from the sale of personal property.

43. 15 U.S.C. §§ 2301 et seq. (1975).

Consumer products that are covered by this warranty statute are products used for personal, family or household purposes. Contracts of service are also included. The products covered by the statute are those distributed in interstate commerce and/or those affecting trade, traffic, transportation or commerce. For the purpose of the statute a consumer is a purchaser of a consumer product or person to whom the good is transferred during the warranty period.

A question which is not really covered by the statute concerns leased consumer products. Today, for example, many people do not buy automobiles outright; they lease them for a period of time. Many other products, such as television sets, are leased for varying periods of time. The general thought is that it is the intent of Congress not to permit a technical failure to transfer title to impair consumer protection. Nevertheless, this will probably cause considerable litigation which may not make lawyers too unhappy. Where the statute is not clear, the courts will have to speak. By analogy to the Uniform Commercial Code, a number of courts will predictably speak in favor of coverage.

The terms of the warranty must be disclosed in plain and simple terms before the sale becomes effective. How often are goods such as grills, clocks and other electrical appliances purchased and a warranty carefully tucked inside a hermetically sealed package? Upon opening the package, it is discovered that the warranty covers everything except "the following exceptions, exemptions and exclusions."

The Federal Trade Commission may sue in its own name; it no longer need seek the aid of the Department of Justice. The latter has heretofore been overloaded with its own litigation and the Federal Trade Commission cases often came at the very tail end of all other litigation. Now the Commission has the right to have its own attorneys try these cases in the courts in the name of the Federal Trade Commission.

The Commission is also directed to prepare rules, and is even given the power to make rules in regard to unfair or deceptive practices. These rules, when promulgated after hearings by the Commission, shall have the force and effect of law. Violations will be handled under Section 5 of the Federal Trade Commission Act.[44] Under this section the Commission may seek redress for individual consumers affected by breach of warranty. In addition to that, it may in

44. *Id.*

its own name seek enforcement of a $10,000 fine for each and every violation. Fines up to $10,000 are authorized to be imposed by the courts upon application of the Federal Trade Commission. The Commission is also granted authority to issue cease and desist orders where deceptive practices or improper warranties are being used.

SUMMARY AND CONCLUSIONS

In conclusion, it is clear that ever-increasing consumer protection seems to be the order of the day. This now includes the injured bystander remedies and damage to goods. The new type of products liability litigation in which attorneys will increasingly be engaged will no longer be limited to breach of warranty, negligence or strict liability, because prospective violations of the Consumer Product Warranty Act will greatly enlarge the field. The Act provides greater consumer protection than has ever been known in the history of the United States.

Here are the specific items that must appear in the warranty:

1. Name and address of the warrantor;
2. To whom the warranty is being made;
3. The products or parts thereof covered;
4. Time for which the warranty is made;
5. What the consumer must do to make the warranty effective—exceptions or exclusions thereto must be plainly and simply set forth;
6. The use by the consumer of means short of litigation to adjust any differences. Such means, for example, include arbitration.[45]

To offset the ever-increasing losses to manufacturers and vendors caused by the award of damages under the federal statute, breach of warranty under the Uniform Commercial Code, or by virtue of negligence or strict liability, product liability insurance is strongly advocated. The resulting increase in price or cost to the consumer would be diffused over a large number of buyers, enhancing consumer protection.

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45. For an analysis of the use of arbitration in commercial contracts, see generally 16 WILLISTON, CONTRACTS (3d ed. Jaeger 1976).

Remedies Under the Act

The remedies available to the consumer must also be disclosed. The elements of warranty must be stated in simple terms. It is specifically declared that injured consumers may recover in state courts or in the United States District Court. Of general interest is that attorneys' fees may be recovered. The statute also provides for class actions. If there is to be such an action, a minimum of 100 persons must join, and the minimum damage amount be $50,000.[46] There is a condition precedent before action may be brought—the warrantor or the vendor must be given the opportunity to remedy the defect or to replace the defective product. No action will lie until the warrantor has this opportunity. If he fails to make the necessary adjustments, then an action may be instituted.

Used cars and used car dealers are also covered. The Federal Trade Commission is expressly directed by the Act to formulate rules for warranties in regard to used car sales.[47] These rules must be promulgated within one year from the date of the Act, January 4, 1975. At this moment, then, these rules formulated by the Federal Trade Commission covering used car sales have become effective.

The second part of the statute, Title II, is described as "Federal Trade Commission Improvements." Based on what the Commission is now authorized to do, it might be fair to state that the Federal Trade Commission is about to emerge from its status as a pigmy among giants and may yet achieve parity with giants and possibly become a giant among pigmies. Now, instead of being merely the protector of goods in commerce, it becomes the protector of goods in or *affecting* commerce.

What is perhaps even more intriguing, and perhaps startling, is that the Federal Trade Commission now has authority to regulate banks, especially when they use misleading advertising. Just how much is being paid and what are you really getting? All of this must now be disclosed. No longer can there be lurid advertisements of the "highest rate of interest ever allowed." The rules and regulations are to be made by the Federal Trade Commission; then, within sixty days, the Federal Reserve Board must put them into effect, provided the Board is in accord with the rules formulated by the Commission.

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46. To find 100 people or more for a class action, the attorney must be able to do this without being guilty of champerty, maintenance or even barratry.

47. 15 U.S.C. §§ 41 et seq. *and especially* § 45 (1974).