Henceforth, the trial court practice should be to enter a second dismissal as of the date of its actual entry and not to "revive" the former order of dismissal. The reason is essentially one of court record keeping and timeliness on appeal, that is, the party's concern is a timely motion under Trial Rule 59. It may in fact have been timely, but the record may not show that it was, if the trial court does no more than "reinstate" the former dismissal. Hence, the trial court should enter its order of dismissal on the amended complaint anew.

III. Contracts and Commercial Law*

A. Scope of the Uniform Commercial Code

In *Helvey v. Wabash County REMC*[1] the Indiana Court of Appeals determined that electricity was "goods" within the meaning of Indiana Code section 26-1-2-105.[2] Plaintiff brought suit for breach of express and implied warranties and alleged certain damages caused to his household appliances by defendant's furnishing electricity of voltage higher than warranted. The suit was filed four years and two months after the incident in question occurred. The trial court entered summary judgment for defendant on the ground that Indiana Code section 26-1-2-725, a four-year statute of limitations, applied and barred the suit. On appeal, plaintiff argued that furnishing electricity was not a transaction in goods, but a furnishing of a service, and that the six-year statute of limitations for accounts and oral contracts[3] should apply.

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*Judith T. Kirtland.

[1]278 N.E.2d 608 (Ind. Ct. App. 1972).

[2]This section provides in part:

> (1) "Goods" means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities . . . and things in action. . . .
>
> (2) Goods must be both existing and identified before any interest in them can pass. . . .

[3]Ind. Code § 34-1-2-1 (1971).

The court stated that the criterion for "goods" was that it be an existing and movable thing.[4] In applying this test, the court noted that electricity was legally considered personal property which may be owned,[5] bartered and sold,[6] stolen,[7] and taxed.[8] The court further elaborated on the requirement that goods be existing and movable by declaring that "[l]ogic would indicate that whatever can be measured in order to establish the price to be paid would be indicative of fulfilling both the existing and movable requirements of goods."[9] Finally, the mandate of Indiana Code section 26-1-1-102(2)(c) that the statute was intended to promote uniformity among the states was cited as authority for the court's reliance on a Pennsylvania case[10] which held that natural gas was "goods" within the scope of the Uniform Commercial Code.

B. Warranties

During the survey period, the Indiana Supreme Court, in *Theis v. Heuer*,[11] considered the issue of implied warranties for fitness for habitability in the construction and sale of new homes. The supreme court, simply adopting the earlier decision[12] of the appellate court as its own, held that the doctrine of caveat emptor, espoused a decade ago in *Tudor v. Heugel*,[13] "can no longer be considered the law of this State with reference to implied warranty of fitness in regard to the purchase of a new residence . . ."[14] and that *Tudor* was expressly overruled.[15]

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[4]278 N.E.2d at 610.

[5]Hill v. Pacific Gas & Elec. Co., 22 Cal. App. 788, 136 P. 492 (1913).

[6]*Id.*

[7]IND. CODE § 35-1-66-3 (1971).

[8]Gross Income Tax Div. v. Chicago Dist. Elec. Generating Corp., 236 Ind. 117, 139 N.E.2d 161 (1956).

[9]278 N.E.2d at 610.

[10]Gardiner v. Philadelphia Gas Works, 413 Pa. 415, 197 A.2d 612 (1964).

[11]280 N.E.2d 300 (Ind. 1972).

[12]Theis v. Heuer, 270 N.E.2d 764 (Ind. Ct. App. 1971), *noted in* 5 IND. LEGAL F. 221 (1971).

[13]132 Ind. App. 579, 178 N.E.2d 442 (1961). In *Tudor* the appellate court held that in the absence of fraud by the vendor or express warranties made by the vendor, no implied warranties arise in the sale of a new home.

[14]280 N.E.2d at 306.

[15]*Id.* at 303, 306.

Plaintiffs alleged in their complaint that they purchased a new home built by the vendors for speculative purposes, that shortly after moving into the house they discovered a defective sewer and drainage system which caused sewage and water to back up and accumulate on the first floor during periods of heavy rain, and that they neither knew nor had reason to know of this defect at the time of the purchase. The trial court, relying upon the doctrine of caveat emptor, dismissed the complaint for breach of warranty and negligence on the ground of failure to state a claim.[16]

The supreme court recognized the potential injustice of the application of the doctrine of stare decisis in this case and the illogic of affording more protection to the consumer who purchased a relatively inexpensive product than to one who made a substantial investment in a new home. These considerations led to the conclusion that implied warranties arise in the sale of all[17] new homes, at least when sold by the builder.[18]

The strengthening of warranties as a protection for the consumer was greatly assisted by *Woodruff v. Clark County Farm Bureau Cooperative,*[19] recently decided by the court of appeals. In this case plaintiff purchased several thousand chickens from defendant in order to replace his flock of egg-producing chickens.

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[16]*Id.* at 301.

[17]Several jurisdictions have recognized an exception to the doctrine of caveat emptor for new houses sold prior to the completion of construction. *See, e.g.*, Glisan v. Smolenske, 153 Colo. 274, 387 P.2d 260 (1963); Sterbcow v. Peres, 222 La. 850, 64 So. 2d 195 (1953); Vanderschrier v. Aaron, 103 Ohio App. 340, 140 N.E.2d 819 (1957); Jones v. Gatewood, 381 P.2d 158 (Okla. 1963). This exception is based on the theory that such a contract is really a contract for construction, not for the sale of real estate. F & S Constr. Co. v. Berube, 322 F.2d 782 (10th Cir. 1963). Thus the courts have concluded that when one contracts to construct a building for a specific purpose, an implied warranty arises that the building will be constructed in a workmanlike manner and be suitable for its intended purpose, in this case habitation. Hill v. Polar Pantries, 219 S.C. 263, 64 S.E.2d 885 (1951).

The *Theis* court adopted the broader approach which implies a warranty of fitness for habitability, regardless of whether the house was finished or unfinished at the time of sale. *See also* Wawak v. Stewart, 247 Ark. 1093, 449 S.W.2d 922 (1970); Weeks v. Slavick Builders, Inc., 24 Mich. App. 621, 180 N.W.2d 503 (1970); Schipper v. Levitt & Sons, 83 S.D. 57, 154 N.W.2d 803 (1967).

[18]For a discussion of the issues left unanswered by this decision, see 5 IND. LEGAL F. 221, 227-29 (1971).

[19]286 N.E.2d 188 (Ind. Ct. App. 1972).

It appeared that certain express statements were made by defendant's agent as to the quality and productivity of the chickens. However, when the chickens were delivered, plaintiff signed a receipt which he was told was intended "to show delivery," but which was entitled "Started Pullet Delivery and Acceptance Receipt" and contained language disclaiming all warranties, express or implied, as to the condition or quality of the chickens.[20] Subsequently, the flock was devastated by disease and its production capabilities were significantly reduced.

Plaintiff filed suit against Farm Bureau for breach of warranty, misrepresentation, and fraud. The trial court granted summary judgment for the defendant and on appeal, the primary issue was whether the trial court had erred "by determining no genuine issue of material fact existed as to express or implied warranties and by relying in part at least on the validity of the disclaimers in the Receipts in making such a determination . . . ."[21] The court of appeals concluded that reversible error had been committed because the warranty disclaimer was insufficient as a matter of law[22] to negative any express or implied warranties. Therefore, the case was reversed and remanded for the trier of fact to determine two issues: whether any express warranties upon which the vendee relied were in fact made and whether any warranties were breached by the actions of defendant.

In considering the effect of the disclaimer upon the implied warranties of merchantibility[23] and fitness for a particular purpose,[24] the court first stated that such warranties, because they

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[20] *Id.* at 191.

[21] *Id.* at 193.

[22] IND. CODE § 26-1-1-201(10) (1971) provides that whether a term or clause is "conspicuous" is for decision by the court.

In Jerry Alderman Ford Sales, Inc. v. Bailey, 291 N.E.2d 92 (Ind. Ct. App. 1972), *petition for rehearing denied*, 294 N.E.2d 617 (Ind. Ct. App. 1973), the court of appeals indicated that the jury might well have found a disclaimer not sufficiently conspicuous to comply with the requirements of section 26-1-2-316(2). In the later decision, denying the petition for rehearing, the court corrected this error by stating that the court must have reached this conclusion. But it seems apparent that there was nothing in the record to support this conclusion. This may be an indication of the lengths to which the Indiana appellate courts will go in order to sustain a jury verdict for the plaintiff in a warranties case.

[23] IND. CODE § 26-1-2-314 (1971).

[24] *Id.* § 26-1-12-315.

arose by operation of law to protect the consumer,[25] must be liberally construed in favor of the buyer[26] and that therefore disclaimers of implied warranties must be strictly construed against the seller.[27] It then concluded that such disclaimers must be conspicuous to be effective and that this requirement was not satisfied in this case. In so doing, the court expressly relied upon the language of Indiana Code section 26-1-2-316(2)[28] which requires a conspicuous disclaimer. However, the court found it unnecessary to consider the effect of section 26-1-2-316(3)[29] in this case. Subsection (3) apparently was intended by the drafters to control over subsection (2) in case of conflict. Subsection (3) begins with the language "[n]otwithstanding subsection (2)" and subsection (2) begins "[s]ubject to subsection (3)." Subsection (3) permits the use of language like "as is" to negate implied warranties and has no ex-

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[25]Intrastate Credit Serv., Inc. v. Pervo Paint Co., 236 Cal. App. 2d 547, 46 Cal. Rptr. 182 (1965); Vernali v. Centrella, 280 Conn. Supp. 476, 266 A.2d 200 (1970).

[26]Houston-Starr Co. v. Berea Brick & Tile Co., 197 F. Supp. 492 (N.D. Ohio 1961); L.O. Whybark Co. v. Haley, 37 Ill. App. 2d 22, 184 N.E.2d 798 (1962); Dougall v. Brown Bay Boat Works & Sales, Inc., 287 Minn. 290, 178 N.W.2d 217 (1970).

[27]Admiral Oasis Hotel Corp. v. Home Gas Indus., Inc., 68 Ill. App. 2d 297, 216 N.E.2d 282 (1966).

[28]This section provides in part:

> Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in the case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. . . .

The court also cited two cases from other jurisdictions, Hunt v. Perkins Mach. Co., 352 Mass. 535, 226 N.E.2d 228 (1967), and Zabriskie Chevrolet, Inc. v. Smith, 99 N.J. Super. 441, 240 A.2d 195 (1968), in support of its conclusion that the disclaimer was ineffective. Arguably authorities from other jurisdictions are more persuasive in cases such as this than generally since UNIFORM COMMERCIAL CODE § 1-102(2) [IND. CODE § 26-1-1-102(2) (1971)] provides that one of the underlying purposes of the act is to make the law uniform among the various jurisdictions.

[29]This section provides in part:

> Notwithstanding subsection (2)
>
> (a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is," "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty . . . .

press requirement that such language be conspicuous.[30] Since the delivery receipt contained such "as is" language and the court required conspicuousness, it seems that subsection (2) is to control over subsection (3) at least to the extent that the former requires a conspicuous disclaimer.[31] This result seems consistent with the desire to protect the consumer[32]—an opposite result would mean that a vendor could bury an otherwise insufficient disclaimer and make it effective simply by attaching the words "as is" without making it in any way obvious to the purchaser.[33]

In its discussion of the express warranties issue, the court emphasized the Code language which declares that express warranties and disclaimers are to be construed as consistent whenever possible but if such construction would be unreasonable, then the disclaimer or limitation is inoperative.[34] Again the court indicated

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[30]The subsection does however refer to the need for language that "calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty . . . ." Arguably this language is indicative of an intent to incorporate the requirement of conspicuousness in this subsection as well as in subsection (2). *See* 1 W. HAWKLAND, A TRANSACTIONAL GUIDE TO THE UNIFORM COMMERCIAL CODE § 1.1903, at 76-78 (1964). However, Professors White and Summers believe that the inclusion of the requirement of conspicuousness in subsection (3) was not the intent of the drafters. J. WHITE & R. SUMMERS, THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 12-6, at 366 (1972). *See also* Hogan, *The Highway and Some of the Byways in the Sales and Bulk Sales Articles of the Uniform Commercial Code*, 48 CORNELL L.Q. 1, 7-8 (1962).

[31]It has been argued that the purpose of subsection (2) was primarily to remove the requirement of a writing. *See* IND. ANN. STAT. § 19-2-316, Comment (1964).

[32]UNIFORM COMMERCIAL CODE § 2-316, Comment (1).

[33]*See* Gindy Mfg. Corp. v. Cardinale Trucking Corp., 111 N.J. Super. 383, 396, 268 A.2d 345, 353 (1970).

[34]IND. CODE § 26-1-2-316(1) (1971). *See* Wilson Trading Corp. v. David Ferguson Ltd., 23 N.Y.2d 398, 244 N.E.2d 685, 297 N.Y.S.2d 108 (1968).

An earlier version of this section provided that "[i]f the agreement creates an express warranty, words disclaiming it are inoperative." UNIFORM COMMERCIAL CODE § 2-316(1) (1952 version). At least one court has indicated that the new language "modifies the 1952 language, but the spirit of the provision remains the same." Berk v. Gordon Johnson Co., 232 F. Supp. 682, 688 (E.D. Mich. 1964).

Professor Nordstrum apparently agrees with this analysis since he cites *Berk* and Walcott & Steele, Inc. v. Carpenter, 246 Ark. 93, 436 S.W.2d 820 (1969), as authority for the statement that

> there is only one way for the seller to be certain that there are no express warranties in a sale—and that is not to use words or conduct which would be relevant to the creation of an express warranty.

R. NORDSTRUM, THE LAW OF SALES § 87, at 269 (1970).

that disclaimers are to be construed strictly against the seller[35] and concluded that if the statements made by Farm Bureau's agent were in fact express warranties, then the disclaimer was unreasonable.

Zoss v. Royal Chevrolet, Inc.,[36] a case recently decided by the Monroe County Superior Court, is also worthy of attention in any discussion of warranties. In *Zoss* the purchaser of an automobile sought to revoke his acceptance pursuant to Indiana Code section 26-1-2-608.[37] The revocation was based on a series of defects admittedly minor in the sense that they did not prevent the operation of the car[38] and an inability on the part of the defendant to repair the auto promptly. The primary issues were whether the written warranty tendered to plaintiff *after* the signing of the contract limited plaintiff's remedy in this case, whether plaintiff's notice of revocation was effective, and whether the alleged defects could satisfy the section 26-1-2-608(1) requirement that the value of the contract be "substantially" impaired.

Judge Bridges first emphasized that the decisional law is clear that a written automobile warranty is not part of the contract unless its terms are called to the attention of the buyer prior

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[35]286 N.E.2d at 200, *citing* Beech Aircraft Corp. v. Flexible Tubing Corp., 270 F. Supp. 548 (D. Conn. 1967); Berk v. Gordon Johnson Co., 232 F. Supp. 682 (E.D. Mich. 1964); Admiral Oasis Hotel Corp. v. Home Gas Indus., Inc., 68 Ill. App. 2d 297, 216 N.E.2d 282 (1966).

[36]11 UCC REP. SERV. 527 (Monroe County, Indiana, Super. Ct., Nov. 15, 1972).

[37]This section provides in part:

> (1) The buyer may revoke his acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to him if he has accepted it
>
> (a) on the reasonable assumption that its non-conformity would be cured and it has not been seasonably cured; or
>
> (b) without discovery of such non-conformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.
>
> (2) Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it . . . .

[38]The court listed the following nonconformities among others: imperfections in the exterior finish, electrical problems, upholstery damage, various rattles, squeaky emergency brakes, extensive paint overspray in the interior, inadequate sealing and weather-stripping of windows and doors, improperly installed luggage rack, paint stains on the convertible top, nonfunctional windshield wipers, faulty engine adjustment, and excessive gas consumption.

to the signing of that contract.[39] Considering the second issue, the effectiveness of the revocation, the court relied upon *Orange Motors v. Dade County Dairies, Inc.*,[40] in which the Florida Court of Appeals judicially recognized the "lemon"—some cars "simply cannot be repaired."[41] The *Orange Motors* and *Zoss* courts indicated that while the seller has the right to make minor adjustments after delivery in order to make the car conform to any warranties, he does not have an unlimited period in which to repair. *Orange Motors* presented a factual situation remarkably similar to that in *Zoss*—the car was in the repair shop nearly one-half of the three months that it was in plaintiff's possession. Both courts concluded that revocation within three months was within a reasonable time.[42]

Finally, the court considered the question of whether the nonconformity relied upon by the plaintiff "substantially" impaired the value of the contract to the plaintiff.[43] The nonconformities taken individually were not substantial but the court recognized the cumulative effect of these minor nonconformities and held that such cumulative defects substantially impaired the contract's value. The court also cited a Georgia case[44] as authority for the proposition that unsuccessful repair was in itself a sufficient nonconformity to permit revocation of acceptance by the buyer. Plaintiff recovered damages for the purchase price of the car plus sales tax, registration fees, interest on the loan, insurance premiums, the cost of speakers installed in the car, pay lost while dealing with the seller, and additional consequential damages in the amount of $225.

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[39]11 UCC REP. SERV. at 531, *citing* Tiger Motors Co. v. McMurtry, 284 Ala. 283, 224 So. 2d 638 (1969); Marion Power Shovel Co. v. Huntsman, 246 Ark. 149, 437 S.W.2d 784 (1969); Zabriskie Chevrolet, Inc. v. Smith, 99 N.J. Super. 441, 240 A.2d 195 (1968).

[40]258 So. 2d 319 (Fla. App. 1972).

[41]*Id.* at 321.

[42]IND. CODE § 26-1-1-204(2) (1971) provides that "[w]hat is a reasonable time for taking any action depends on the nature, purpose and circumstances of such action." For a discussion of the time periods involved, see Lanners v. Whitney, 247 Ore. 223, 428 P.2d 398 (1967).

[43]The test for substantial impairment is based upon value to the particular buyer in his particular circumstances. It is not limited by the actual knowledge of the seller. *See* UNIFORM COMMERCIAL CODE § 2-608, Comment 2. For a discussion of the meaning of substantial impairment, see Campbell v. Pollack, 101 R.I. 223, 221 A.2d 615 (1966).

[44]Jacobs v. Metro Chrysler-Plymouth, Inc., 188 S.E.2d 250 (Ga. App. 1972).

C. Remedies

1. Punitive Damages

Two important cases decided by the Indiana Court of Appeals during the survey period further developed Indiana law in the area of punitive damages in contracts cases. The general rule in Indiana is that punitive damages may not be recovered in an action for breach of contract.[45] However, it is apparent that a single act may give rise to an action in tort or for breach of contract; in such cases, if the essential elements of an award of punitive damages are otherwise present, a court is authorized to award such damages pursuant to a complaint sounding in tort or contract.[46]

However, the requirement that the essential elements of an award of punitive damages be present has created some uncertainty since it is unclear what the essential elements are. *Standard Land Corp. v. Bogardus*,[47] decided by the Indiana Court of Appeals, First District, and *Jerry Alderman Ford Sales, Inc. v. Bailey*,[48] decided by the Second District, discussed at length the issue of what elements will support an award of punitive damages in a contract case[49] and reached apparently inconsistent conclusions.

In *Standard Land* purchasers of lots in a housing development sued to enforce a contract between the vendor and the builder for the establishment of a planned community with a golf course. The suit resulted primarily from a determination by the vendor that it would not fulfill its contractual obligation to build, maintain, and make available the golf course facilities. Plaintiffs sued both the vendor and the builder; the builder then filed a cross-claim against the vendor. Of central concern in this discussion is the trial court's award of $5000 in punitive damages to the cross-claimant, apparently on the basis of the court's finding that the vendor

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[45]Hedworth v. Chapman, 135 Ind. App. 129, 192 N.E.2d 649 (1963).

[46]Jerry Alderman Ford Sales, Inc. v. Bailey, 291 N.E.2d 92 (Ind. Ct. App. 1972); Murphy Auto Sales, Inc. v. Coomer, 123 Ind. App. 709, 112 N.E.2d 589 (1953); 25 C.J.S. *Damages* § 25 (1955).

[47]289 N.E.2d 803 (Ind. Ct. App. 1972).

[48]291 N.E.2d 92 (Ind. Ct. App. 1972).

[49]Several tests have been used in Indiana tort cases in determining whether an award of punitive damages was proper. Some cases have required "oppressive malice or wantonness," while others have sustained an award based upon a "heedless disregard of the consequences." *See* Citizens' St. R.R. v. Willoeby, 134 Ind. 563, 33 N.E. 627 (1893); Jones v. Hernandez, 263 N.E.2d 759 (Ind. Ct. App. 1970); Monarch Buick Co. v. Kennedy, 138 Ind. App. 1, 209 N.E.2d 922 (1965).

acted in an oppressive manner and with a wanton disregard for the builder's rights.[50]

The court of appeals extensively reviewed Indiana case law concerning punitive damages in contract cases and concluded that such an award was sustainable only on the ground of fraud. The court considered the cases of *Murphy Auto Sales, Inc. v. Coomer*[51] and *Hedworth v. Chapman*,[52] both involving suits on contracts, and emphasized that despite the broad language used, especially in *Murphy*,[53] both cases contained allegations and findings of fraud. Because it was dealing with an exception to the general rule of no punitive damages in contract cases,[54] the court narrowly construed the holdings in *Murphy* and *Hedworth* and reversed the trial court's award of punitive damages since there was nothing in the record to support a finding of fraud.

The *Jerry Alderman* court considered the same issue and concluded that fraud was not necessary to recover punitive damages.[55] In this case, plaintiff sued for damages for breach of warranty and conversion and for breach of a contract of bailment and introduced evidence tending to show "malice and oppressive conduct" on the part of the defendant. The court extensively discussed *Murphy*, as did the First District in *Standard Land*, and determined that the broad language in the case was the relevant Indiana law, despite the actual allegations of fraud in that case.[56] Particularly emphasized was the *Murphy* language that "where malice, gross fraud and oppressive conduct is shown punitive damages are allow-

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[50]289 N.E.2d at 811.

[51]123 Ind. App. 709, 112 N.E.2d 589 (1953).

[52]135 Ind. App. 129, 192 N.E.2d 649 (1963).

[53]123 Ind. App. at 717-18, 112 N.E.2d at 593.

[54]In Voelkel v. Berry, 139 Ind. App. 267, 218 N.E.2d 924 (1966), the court analyzed *Hedworth* and determined that punitive damages were proper only when there was a finding of fraud and "facts which positively require it in the interest of justice." *Id.* at 270, 218 N.E.2d at 926.

[55]The issue of punitive damages actually arose in the context of an analysis of appellant's contention that the evidence of his "oppressive and malicious conduct" was improperly admitted since plaintiff failed to specifically allege fraud in her complaint. *See* IND. R. TR. P. 9(B). The court concluded, however, that the evidence was actually tending to show a malicious state of mind, not actionable fraud, and was therefore properly admitted pursuant to the second sentence in Trial Rule 9(B).

[56]291 N.E.2d at 98.

able . . . ."[57] *Murphy* was used as authority for the proposition that evidence of a malicious or fraudulent state of mind, evidence of the facts not amounting to fraud, would authorize an award of punitive damages in a suit sounding in contract.[58] The court merely noted the *Standard Land* decision without any discussion of the result.

2. Measure of Damages

The general rule of the measure of damages in breach of warranty actions is expressed in Indiana Code section 26-1-2-714 as "the difference between the value of the goods accepted and the value they would have had if they had been as warranted" plus incidental or consequential damages.[59] Consequential damages are recoverable to the extent that they are the direct, immediate, and probable result of the breach of an implied warranty.[60] The court of appeals in *Jerry Alderman Ford Sales, Inc. v. Bailey*[61] considered the issue of whether consequential damages include

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[57]123 Ind. App. at 718, 112 N.E.2d at 593.

[58]291 N.E.2d at 98. In denying a petition for a rehearing, 294 N.E.2d 617 (Ind. Ct. App. 1973), the court indicated that the jury might have based its award of punitive damages upon defendant's conversion when plaintiff brought the car in for repair as well as upon the evidence relating to the contract of sale. However, no limitation was placed upon the broad language as to the propriety of an award of punitive damages in a contract case.

[59]IND. CODE § 26-1-2-715 (1971) provides:

> (1) Incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.
>
> (2) Consequential damages resulting from the seller's breach include (a) any loss resulting from general or particular requirements and needs of which the seller at the time of the contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and (b) injury to person or property proximately resulting from any breach of warranty.

[60]Bob Anderson Pontiac, Inc. v. Davidson, 293 N.E.2d 232 (Ind. Ct. App. 1973); *see* Drilling & Serv., Inc. v. Cato Enterprises, Inc., 134 Ind. App. 668, 191 N.E.2d 114 (1963).

[61]291 N.E.2d 92 (Ind. Ct. App. 1972).

damages for the loss of profits. Relying on Indiana case law[62] which antedated the adoption of the Uniform Commercial Code and Code cases from other jurisdictions,[63] the court concluded that Indiana law did not preclude the use of loss of profit[64] as a measure of damages,[65] even if the property was destroyed.[66] While the court

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[62]*See, e.g.*, Page v. Ford, 12 Ind. 46, 50 (1859), *citing* Dewint v. Wiltsie, 9 Wend. 325 (N.Y. Sup. Ct. 1832); Weedle v. I.R.C. & D. Warehouse Corp., 119 Ind. App. 354, 85 N.E.2d 501 (1949); Weismann Motor Sales, Inc. v. Allen, 106 Ind. App. 284, 19 N.E.2d 505 (1939).

[63]The court cited Neville Chem. Co. v. Union Carbide Corp., 294 F. Supp. 649 (W.D. Pa. 1968); Adams v. J.I. Case Co., 125 Ill. App. 2d 388, 261 N.E.2d 1 (1970); Steele v. J.I. Case Co., 197 Kan. 554, 419 P.2d 902 (1966); Ford Motor Co. v. Taylor, 60 Tenn. App. 271, 446 S.W.2d 521 (1969).

See Lewis v. Mobil Oil Corp., 438 F.2d 500 (8th Cir. 1971); Gerwin v. Southeastern Cal. Ass'n of Seventh Day Adventists, 14 Cal. App. 3d 209, 92 Cal. Rptr. 111 (1971); Valley Die Cast Corp. v. A.C.W., Inc., 25 Mich. App. 321, 181 N.W.2d 303 (1970). *Contra*, Comet Indus., Inc. v. Best Plastic Container Corp., 222 F. Supp. 723 (D. Colo. 1963) (Uniform Sales Act case); Marion Power Shovel Co. v. Huntsman, 246 Ark. 152, 437 S.W.2d 784 (1969); Keystone Diesel Engine Co. v. Irvin, 411 Pa. 222, 191 A.2d 376 (1963); Head & Guild Equip. Co. v. Bond, 470 S.W.2d 909 (Tex. Civ. App. 1971). *See also* J. WHITE & R. SUMMERS, THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 10-4 (1972).

[64]Loss of profits awards are properly confined to net profit, not gross profit. 291 N.E.2d at 105, n.6. *See also* Gerwin v. Southeastern Cal. Ass'n of Seventh Day Adventists, 14 Cal. App. 3d 209, 92 Cal. Rptr. 111 (1971); A.T. Klemens & Sons v. Reber Plumbing & Heating Co., 139 Mont. 115, 360 P.2d 1005 (1961); Ford Motor Co. v. Taylor, 60 Tenn. App. 271, 446 S.W.2d 521 (1969).

[65]The court did not make a distinction, as have some courts, between lost profits from contracts of which defendant was actually aware and those unknown to him at the time of the contracting. *See, e.g.*, Schaefer v. Fiedler, 116 Ind. App. 226, 63 N.E.2d 310 (1945); Weismann Motor Sales, Inc. v. Allen, 106 Ind. App. 284, 19 N.E.2d 505 (1939).

[66]

> Thus to restrict the measure of damages to a difference in market value is to ignore that the right to use property is perhaps the most important incident of its ownership. . . . During the time defendant wrongfully withholds the property, ostensibly for purposes of repair, plaintiff is denied the use thereof and is not obligated to replace or seek to replace the equipment for the simple reason that he is not aware that he will not have his property restored to him in 100% functional order. When, however, it should appear or is made known to plaintiff that the property is worthless (subject to a reasonable time for replacement), then and only then does his right to loss of use cease.

291 N.E.2d at 105. *See* Steele v. Weidemann Mach. Co., 280 F.2d 380 (3d Cir. 1960); Chesapeake & O. Ry. v. Elk Refining Co., 186 F.2d 30 (4th Cir.

noted the rule that less certainty is required to prove the amount of lost profits than to prove that profits were in fact lost,[67] it remanded the case with instructions that plaintiff consent to a remittitur or a new trial be granted on the ground that the record did not contain evidence to support the substantial damages awarded.[68]

3. Limitations on Remedies

In *Indiana & Michigan Electric Co. v. Southern Wells School Building Corp.*[69] the supreme court defined the remedies available to a consumer who alleged an overcharge by a public utility. Southern Wells purchased electrical power from Indiana & Michigan Electric Co. and the latter supplied a written guarantee that total electric power costs would not exceed a specified amount. When defendant charged more than that rate and plaintiff paid only the maximum rate set forth in the guarantee, defendant served notice that electric power would be discontinued unless the balance was promptly paid. Southern Wells then obtained a preliminary injunction restraining the discontinuation of power. The supreme court concluded that the injunction should not have been granted because there existed an adequate remedy at law—Southern Wells should have paid the bill in full and then sued for the overcharge.[70] Some emphasis was placed upon the public or quasi-public nature of the consumer in this case.[71] However, much of the court's rationale would apply equally to the private consumer—the court stressed the public's interest in efficient and prompt utility services, "undiminished by depleted revenues."[72]

1950); Reynolds v. Bank of America Nat'l Trust & Sav. Ass'n, 53 Cal. 2d 49, 345 P.2d 296 (1959); New York Cent. R.R. v. Churchill, 140 Ind. App. 426, 218 N.E.2d 372 (1966).

[67]Reed v. Williams, 247 Ark. 314, 445 S.W.2d 90 (1969).

[68]*See* American Fletcher Nat'l Bank & Trust Co. v. Flick, 146 Ind. App. 122, 252 N.E.2d 839 (1969); Ford Motor Co. v. Taylor, 60 Tenn. App. 271, 446 S.W.2d 521 (1969). *See generally* Note, *Damages: Limitations on Recovery of Lost Profits in Indiana*, 31 IND. L.J. 136 (1955).

[69]279 N.E.2d 228 (Ind. 1972).

[70]The court noted that irreparable damage would likely have resulted from a discontinuation of electricity, but that there was no showing that funds were not availbale to pay the bill. Had such a showing been made, the court might have concluded that Southern Wells lacked an adequate remedy at law.

[71]279 N.E.2d at 229.

[72]*Id.*, *quoting from* State *ex rel.* Goodwin v. Cadwallader, 172 Ind. 619, 642, 87 N.E. 644, 652 (1908). *Goodwin* involved a dispute between the owners of two telephone exchanges and an attempt to compel the provision of services.

During the survey period, the court of appeals also considered the meaning of Indiana Code section 28-1-11-11[73] which provides that no bank shall be liable for the value of property received by it in safety deposit boxes. In *Welbourn v. Peoples Loan & Trust Co.*[74] plaintiff, a bank customer, brought suit against the defendant for losses suffered when his property was taken from a safety deposit box during a burglary. Although there was considerable evidence from which a jury could have found defendant negligent in maintaining its security system,[75] the trial court entered judgment on the evidence for the defendant on the theory that the statute plainly precluded a finding of liability regardless of the negligence of the defendant. The court of appeals first discussed the intent of the General Assembly in enacting the statute and concluded that it was to protect banks which had been diligent in protecting their depositories and their patrons' property. Since the bank's indemnity policy carrier would reimburse it for any judgment entered against it, and the bank's assets would, therefore, not be diminished, the court felt that the spirit of section 28-1-11-11 was not contravened by a finding of liability. Holding that an exception to the broad rule of the section existed when a bank has been negligent in protecting its customers' property and an indemnity policy would cover any loss suffered by the bank, the court reversed and remanded for a new trial.[76]

The court also noted that the terms of the agreement permitted defendant to terminate service to any customer indebted to it. *Cf.* Irvin v. Rushville Coop. Tel. Co., 161 Ind. 524, 531, 69 N.E. 258, 261 (1903).

[73]This section reads in part:

> No bank or trust company nor any of the assets thereof shall be liable, for the value of any property received by it pursuant to the power conferred by this section nor for damages for the loss, theft or misappropriation thereof.

[74]283 N.E.2d 544 (Ind. Ct. App. 1972).

[75]In its appellate brief, defendant admitted that such a finding could have been made by the trier of fact. *Id.* at 548.

[76]In a vigorous dissent, Judge Lybrook argued that this decision amounted to a judicial repeal of section 28-1-11-11. *Id.* at 551-53. He felt that the section was clear and unambiguous and that there was therefore no opportunity for judicial construction, despite the admittedly harsh result. *See* State *ex rel.* Mason v. Jacobs, 194 Ind. 327, 142 N.E. 715 (1924); Boryczka v. Boryczka, 87 Ind. App. 511, 161 N.E. 830 (1928).

D. Insurance

In *Vernon Fire & Casualty Insurance Co. v. Thatcher*[77] the court of appeals determined that evidence that an insurance company's agent solicited an application for a policy and delivered the policy to the insured was "sufficient to imply that the agent [was] authorized by the company to represent to the solicitee, for the purpose of inducing an order, the provisions of the policy coverage . . . ."[78] Plaintiffs, owners of a farm in Owen County and a saddle barn concession in a state park, obtained a farm-owner's policy issued by defendant and solicited by an agent of defendant. The policy insured unscheduled personal property both on the farm premises and away from the farm. However, the coverage on the property away from the farm was specifically limited by an exclusionary clause stating that "[p]roperty pertaining to a business [was] not covered."[79] Despite this exclusion, the soliciting agent represented to plaintiffs on at least two occasions that all property at the saddle barn, including that used in operating the concession, was covered under the policy. When a fire at the saddle barn destroyed property used in the business, defendant refused to pay for the loss.

The court of appeals recognized that defendant had not actually authorized the agent to make the particular statements as to the extent of coverage, but concluded that the actual authority of the agent was not the issue. The court specifically disapproved language in an earlier opinion[80] indicating that an applicant for insurance was "presumed to know that under our law [the agent's] authority to represent the appellant company was required to be in writing"[81] and that it was the duty of the applicant who dealt "with a special agent to ascertain the extent of the agent's authority before dealing with him."[82] Considering the evidence in the instant case, the court of appeals concluded that the insured had the right to assume that the soliciting agent was authorized to make the representations in question, particularly since the statements were made in the presence of defendant's Special Representative who managed all southern Indiana operations and was authorized to

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[77]285 N.E.2d 660 (Ind. Ct. App. 1972).

[78]*Id.* at 662.

[79]*Id.*

[80]State Life Ins. Co. v. Thiel, 107 Ind. App. 75, 20 N.E.2d 693 (1939).

[81]*Id.* at 88, 20 N.E.2d at 698.

[82]*Id.* at 89, 20 N.E.2d at 698.

explain policy coverage to an insured.[83] It is unclear from the decision whether the actual knowledge of defendant was essential to the result but the court's language in its discussion of *Farmers Mutual Insurance Co. v. Wolfe*[84] did not seem to require such knowledge. The court stated that the issue of the soliciting agent's authority was not decided in that case and that the *Farmers Mutual* decision should not be read "to imply that authority to solicit insurance [did] not carry with it, as a power impliedly incidental thereto, the apparent authority to state what the policy [covered]."[85]

IV. Corporate Taxation*

During the survey period, the Indiana Supreme Court and Court of Appeals handed down three decisions concerned with corporate taxation. Statutory interpretations of the Indiana Code concerning penalty abatement, interstate business activities by Indiana corporations, and gross income exemptions are the areas in which the courts construed corporate tax laws.

In *Buell v. Budget Rent-A-Car, Inc.*,[1] the Treasurer of Marion County made demand for taxes, penalties, and interest pursuant to

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[83]On these grounds, the court distinguished Cadez v. General Cas. Co., 298 F.2d 535 (10th Cir. 1961), in which the court refused to hold the insurance company liable for the soliciting agent's representations, of which the company had no knowledge. The *Cadez* court indicated that it would have reached a different result had there been a showing of knowledge:

> If untrained or over-zealous agents make a negligent or reckless representation as to policy coverage and it can be shown that the company had actual knowledge thereof or that knowledge may be implied from the circumstances of a particular situation, the company must accept the responsibility.

Id. at 537.

[84]142 Ind. App. 206, 233 N.E.2d 690 (1968).

[85]285 N.E.2d at 671.

*Robert G. Leonard.

[1]227 N.E.2d 798 (Ind. Ct. App. 1972).