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purchase goods through the rent–to–own agreements and the actual value of the goods. However, it argued, that it offered services, such as free delivery and maintenance, which justified the higher cost, and this presented a factual issue as to whether it charged excessive interest. The court, however, found that DEF offered no real evidence of the value of such services. As a result, the court concluded that no reasonable factfinder would find that the large disparity between the prices DEF charged and the value of the goods and services DEF offered fell within the amount allowed by the usury statute.

Addressing the fourth element of usury, the court stated that while DEF did not intend to violate the usury law, it did intend to charge an excessive rate of interest, which is all that is required by the statute. Therefore, the supreme court concluded that that lower court correctly found no genuine issue of material fact as to whether DEF violated the usury statute and therefore properly granted summary judgment for the plaintiffs on their usury claim.

RPAA and CCSA offer choice of remedies

Finally, DEF contended that the RPAA, enacted in 1990, effectively repealed the CCSA. In analyzing this issue, the supreme court examined both the language and legislative history of the RPAA and concluded that it did not expressly repeal the CCSA. In so ruling, the court noted in particular that the RPAA that stated that the remedies offered "shall not be construed as restricting any remedy that is otherwise available." The court also observed that while the legislature had considered repealing the CCSA and had even included such wording in the original statute, it later adopted amendments that deleted such provisions. Because the legislature did not expressly state its intent to repeal the CCSA or restrict the consumer's remedies to those listed in the RPAA, the court held that the plaintiffs were not barred from seeking a remedy under the CCSA. Furthermore, the court did not find that the two laws were in irreconcilable conflict with one another. Rather, it held that the two laws could be interpreted to offer cumulative remedies for consumer protection.

In concluding, the Minnesota Supreme Court held that all rent–to–own transactions must be treated as consumer credit sales, as defined by the CCSA, and that rent–to–own customers were entitled to statutory protections. It affirmed summary judgment for the plaintiffs and remanded the case to the trial court for the determination of damages.

Lanham Act does not cover consumer claims

By Travis Ketterman

In *Serbin v. Ziebart Int'l Corp., Inc.*, 11 F.3d 1163 (3d Cir. 1993), the Third U.S. Circuit Court of Appeals held that consumers do not have standing to bring false advertising claims under Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a). Additionally, the court held that the 1988 amendment to the Lanham Act did not broaden its jurisdiction to include consumer claims.

The Lanham Act, as enacted in 1946, regulates and protects trademarks; in addition, it protects persons engaged in commerce from the "deceptive and misleading use of the marks." The 1946 statute provided a cause of action for persons engaged in commerce when another person knowingly uses false advertising in the merchandising of goods and services. In 1988, Congress modified Section 43(a) to authorize "any person who believes that he or she is likely to be damaged by such acts" to bring a cause of action under the Lanham Act in federal court. In a consolidated appeal, the Third Circuit addressed whether the original Lanham Act, or its more recent modification, was sufficiently broad to give standing to consumers who did not assert any commercial interest or injury.

In 1990, Sara Serbin and George Baker purchased new automobiles in separate transactions. At the time of these purchases, each also purchased a "Super Rust Protection" policy from the defendants, Ziebart International Corporation and Ziebart Company (collectively referred to as Ziebart). Subsequently, Serbin and Baker brought suit against Ziebart in the U.S. District Court for the Western District of Pennsylvania, alleging that defendants' advertisements about "Super Rust Protection" contained false representations which misled them into purchasing the additional policy. Moreover, they contended that Ziebart had knowingly made these false statements. Alleging to have been misled by Ziebart's representations into purchasing a policy that duplicated protection already extended to new automobile buyers through standard manufacturers' warranties, Serbin and Baker brought claims under Section 43(a) of the Lanham Act as well as pendant state law. They also sought class certification on behalf of all persons who had purchased the "Super Rust Protection" in connection with a new auto purchase.

The District Court granted Ziebart's motion to dismiss the complaint for failure to state a claim under the Lanham Act. It ruled that only a party with a "reasonable and cognizable" commercial interest that has been or potentially might be injured by the alleged violation has standing to bring a claim. The court did not recognize Serbin and Baker, as consumers, to have such commercial interests. In addition, the court dismissed the state claims without prejudice.

In the second case consolidated for appeal, Sheilah Guarino brought suit in the U.S. District Court for the District of New Jersey against Sun Company, Inc., Sun Refining & Marketing Company, and Wells, Rich, and Greene, Inc. (collectively referred to as Sun). In her complaint, Guarino alleged that Sun had knowingly used false advertising to promote purchasing of its highest octane gasoline. She brought suit under both Section 43(a) of the Lanham Act and pendant state law. Guarino also sought class certification on behalf of all persons who had purchased the high octane gasoline from April 1, 1990 through the date of class certification.

The District Court granted Sun's motion for summary judgment on the basis that consumers had no standing to bring a claim under Section 43(a) of the Lanham Act. In its ruling, the court recognized that granting consumers standing to bring suit would broaden the Lanham Act from a regulation of unfair competition to a catchall consumer protection statute. The court suggested that if such expansion was desirable, it should be done by Congress.

Consolidating these two cases on appeal, the Third Circuit first addressed the issue of whether a consumer had standing to bring a cause of action under the Lanham Act. In its analysis, the court looked to legal precedents from its sister circuits.

The Third Circuit first turned to the influential Second Circuit case, *Colligan v. Activities Club of New York*, 442 F.2d 686 (2d Cir. 1971), for guidance. In *Colligan,* the Second Circuit affirmed the dismissal of a false advertising suit filed by high school students against the promoters of a ski weekend. The Circuit Court rejected the plaintiffs' assertion that "any person," as used in Section 43(a), unambiguously granted consumers a cause of action. In its review of the legislative history of the Lanham Act, the Second Circuit declared that Congress intended to create a "special and limited unfair competition remedy" that protected commercial interests from unfair commercial conduct, but did not protect consumer interests.

Additionally, the Third Circuit found further guidance to interpret Section 43(a) of the Lanham Act from several decisions from the Ninth U.S. Circuit Court of Appeals. In addressing the issue of standing, the Ninth Circuit declared that the dispositive question for determining Section 43(a) standing was whether the plaintiff had a "reasonable interest to be protected against false advertising." *Smith v. Montoro*, 648 F.2d 602 (9th Cir. 1981). In *Smith*, the Circuit Court held that a movie actor could file suit under Section 43(a) against film producers who substituted the name of another actor for his in screen credits and movie advertisements because the actor had a reasonable interest in having his name associated with his work.

Subsequently, the Ninth Circuit also held that the false advertising in dispute must result in some type of unfair competition. *Halicki v. United Artists Communication, Inc.*, 812 F.2d 1213 (9th Cir. 1987). In *Halicki,* the Circuit Court affirmed the lower court's grant of summary judgment to a movie distributor and several movie theaters who were sued by a movie producer for falsely advertising a "PG" movie as an "R" rated movie. Since the plaintiff's claim alleged false advertising about the quality of the product and not unfair competition, the court held that the action did not fall within the ambit of Section 43(a) of the Lanham Act.

The Ninth Circuit eventually resolved the apparent conflict between *Smith* and *Halicki* concerning the role of competition in Section 43(a) claims. In *Waits v. Frito-Lay*, 978 F.2d 1093 (9th Cir. 1992), the plaintiff, a singer, successfully sued the defendant for imitating his well-known voice in a radio commercial. In finding for

Please see "False advertising" on page 37

Court finds no manufacturer liability in child's death

By Bryan M. Sims

In *Todd v. Societe BIC, S.A.*, 21 F.3d 1402 (7th Cir. 1994), the Seventh U.S. Circuit Court of Appeals held that a disposable lighter manufactured by Bic Corporation (Bic) was not unreasonably dangerous as to require imposing strict liability upon its manufacturer. It further held that for product liability analysis, Illinois law dictates the use of the consumer contemplation test, which examines the expectation of the "ordinary consumer." In so ruling, the court narrowed the scope of liability for a manufacturer by eliminating the use of the risk utility test in cases where the product design is simple and the danger obvious.

Fire claims a child's life

In March 1988, Cori Smith, age four, obtained a lighter belonging to one of the adult smokers in a home shared by the Smith and Todd families. Although Cori started a small fire in her parents' bedroom, the flames were extinguished before any damage was sustained.

Following this incident, the adults in the household warned Cori, as well as the other five children in the house, about the dangers of playing with matches and lighters. However, on the morning of March 27, 1988, Cori found a Bic lighter on a table in the living room. She set fire to some papers which were on the floor of the bedroom where twenty–two month old Tiffany Todd slept. The adults, who had been asleep, did not awaken in time to prevent the fire from spreading. Tiffany died in the blaze.

Rodney Todd, Sr., Tiffany's father and administrator of her estate, brought suit against Bic in a diversity action in the U.S. District Court for the Northern District of Illinois. In his complaint, Todd alleged that Bic was negligent and strictly liable for selling a defective product. He claimed that the lighter was unreasonably dangerous because it lacked a child–resistant feature and failed to provide adequate warning of potential dangers. The disputed warning read "KEEP OUT OF THE REACH OF CHILDREN."

The District Court granted summary judgment for Bic. It found that the lighter was not defective because it provided the small flame it was intended to provide. Moreover, the court held that the manufacturer's warning was adequate. It also dismissed Todd's public policy arguments for holding Bic strictly liable, stating that "public policy only requires holding manufacturers and sellers liable if their product is found to be defective or unreasonably dangerous." Todd subsequently appealed to the U.S. Circuit Court of Appeals.

On review, a divided appellate panel reversed the District Court's grant of summary judgment for the defendant. The full circuit court subsequently vacated that order, reheard the case *en banc*, and unanimously agreed that the warning on the lighter was adequate. Additionally, it also certified two questions of state law to the Illinois Supreme Court: (1) whether the court must consider the "foreseeable user" under the consumer contemplation test; and (2) whether the risk–utility test was applicable. However, the Illinois Supreme Court declined certification. In light of the Illinois court's silence, the Seventh Circuit looked to other persuasive authority to properly interpret Illinois law on these issues.

Lighters not too dangerous

On appeal, Todd first contended that Bic was strictly liable for damages because the lighter it manufactured was unreasonably dangerous under the consumer contemplation test. According to the consumer contemplation test, a product is unreasonably dangerous if it is dangerous beyond that which is contemplated by the ordinary consumer. If the product is used properly and it fails to perform in its expected manner, a manufacturer may be held strictly liable for the resulting injuries.

After its review, the Seventh Circuit held that the disputed lighter performed exactly as expected. The court noted that the ordinary consumer would anticipate that, when used correctly, the Bic lighter would produce a small flame. Additionally, the ordinary consumer would predict that when the small flame is placed in contact with a combustible material, such as paper, a larger flame would be produced. The court concluded that while a lighter may be dangerous because it can start a fire, it is not dangerous to the extent of being unreasonable. Therefore, the Circuit Court held that since the lighter performed in a manner consistent with the expectation of the ordinary consumer, it was not unreasonably dangerous and Bic was not strictly liable.

Todd next argued that the consumer contemplation test should consider the expectation of the foreseeable user, instead of only the ordinary consumer. For purposes of the appeal, Bic had conceded that children were foreseeable users of its lighter. Therefore, Todd contended that the court improperly granted summary judgment because it failed to include children in its consumer contemplation test analysis.

Turning to this issue, the Circuit Court declared that Illinois law clearly indicates that the applicable standard in the consumer contemplation test is the expectation of the ordinary consumer. The Seventh Circuit reasoned that children, unlike ordinary consumers, do not possess the knowledge common to the community, and as a result, their expectations are inappropriate for consideration in the consumer contemplation test. In addition, the court warned that allowing such a standard would result in absolute liability for manufacturers because children do not perceive the dangers that are inherent in every product. For these reasons, the court concluded that it is inappropriate to consider the expectations of the foreseeable user in the consumer contemplation test.

Test not always applicable

Todd then argued that the district court's failure to consider the risk–utility test, in addition to the consumer contemplation test, mandated reversal of the summary judgment. He insisted that the lighter might be unreasonably dangerous under either test. Under the risk–utility test, a product is unreasonably dangerous, even when it meets consumer expectations, if: (1) the defective design is excessively dangerous and preventable; and (2) the risk of danger in the design outweighs the benefits.

The Seventh Circuit observed that, in certain cases, the Illinois Supreme Court has adopted the risk–utility test. However, in such situations, the product in controversy was complex and the risk it presented was not obvious. In the case at hand, it found the lighter was a simple and obviously dangerous product. The Circuit Court held that the risk–utility test would not apply to a simple but obviously dangerous product because it was unlikely that the Illinois Supreme Court would apply the test to such a product.

The Circuit Court then addressed two final issues: (1) whether the warning was adequate; and (2) whether the manufacturer was negligent. It affirmed the District Court's holding that the warning was adequate. The court also found that Bic was not negligent because the product was not unreasonably dangerous. Therefore, Bic did not breach its duty to produce a reasonably safe product. In so finding, the Circuit Court concluded that an ordinary disposable cigarette lighter is not unreasonably dangerous so as to warrant holding its manufacturer negligent or strictly liable.

Please see "Lighter liability" on page 38

Fair Debt Collection Practices Act awards limited

By Judith Gorske

In *Wright v. Finance Serv. of Norwalk, Inc.*, 22 F.3d 647 (6th Cir. 1994), the Sixth U.S. Circuit Court of Appeals held that the executor of a decedent's estate had standing to sue a debt collection agency under the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §§ 1692 to 1692*o*, for violations involving letters sent by the agency to the decedent. The court also held that Section 1692k(a)(2)(A) of the FDCPA limits additional damages to $1,000 per proceeding.

Gladys Finch died in October,1989. After her death, Finance Service of Norwalk (Finance Service), a debt–collection agency, sent Finch 14 letters attempting to collect $112 for an allegedly overdue medical bill. Betty Wright, acting as executor for the estate, notified Finance Service of Finch's death. The agency then discontinued its correspondence.

Wright then filed a complaint against Finance Service in the U.S. District Court for the Northern District of Ohio, alleging a total of 30 FDCPA violations contained within the 14 letters Finance Service had sent Finch. Subsequently, both parties moved for partial summary judgment. Wright sought partial summary judgment on the issue of the 30 alleged FDCPA violations. Finance Service moved for partial summary