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FEATURE ARTICLE

The Illinois Consumer Fraud Act: Hey! Where Did the Strict Constructionists Go? Judicial Add-Ons Are Ruining a Perfectly Good Statute

by Clinton A. Krislov

The Illinois Consumer Fraud and Deceptive Business Practices Act,¹ was originally enacted as a relatively simple act to achieve consumer redress by eliminating the scienter and other technical pleading and proof requirements that make common law fraud an almost totally useless vehicle to redress consumer frauds in a mass market society. However, recent decisions by the Illinois appellate and supreme courts have added pleading and proof hurdles not contained in the statute that yank the teeth out of the statute and eviscerate its effectiveness as a tool of consumer redress.

By adding pleading requirements and other exceptions and hurdles not contained in the statute, the courts have frustrated legislative intent, and absolutely violated the fundamental concepts of separation of powers. Strict construction of the laws is necessary in order to effectuate the intent of the legislature, whether in support of or in opposition to recovery. The court's hostility toward enforcing the laws as they read on the books, whether motivated by pro- or anti-consumer rights policy tilt, undermines respect for the courts in exercising their

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appropriate role in government to interpret the laws, and reconcile them within our constitutional framework.

A Consumer Fraud Act claim needs only to allege and prove (1) a statement that misrepresents or omits a material fact; (2) defendant's intent that the deceptive statement be relied on; and (3) damages arising from the misrepresentation or omission.² Unlike common law fraud, scienter is not required and attorneys' fees are available.

Because scienter is not required in a Consumer Fraud Action, the plaintiff is not required to show that the defendant knew the statement was false in making it. Thus, even "innocent misrepresentations" are actionable.³ This is of monumental importance because plaintiffs usually have no basis for alleging defendants' knowledge at the time the statement is

made, and proving state of mind is ordinarily impossible as a practical matter in most cases.

Moreover, the statute also allows the award of attorneys' fees. In addition to the substantive recovery, the statute provides an incentive for attorneys to bring these cases. It also increases the potential that consumers can actually be restored to the position they would have been in if no fraud had occurred. In contrast, in a common law fraud claim, generally the result is requiring the defendant to repay only the amount received from the fraud, meanwhile the consumer must bear the attorneys' fees. Since the common law claim carries with it the American Rule that each side pays its own attorneys' fees and costs, the defendant never pays more than the amount he should never have received in the first place, while the consumer is not made whole.

I. The "First Bite Free" Doctrine

In relatively short order, recent Illinois court decisions have added a new hurdle to asserting Consumer Fraud Act liability, creating a "First-Bite-Free" license so that consumer fraud liability arises only for deceptive activities that occur after a court has previously adjudicated and declared them illegal.

For example, in *Stern v. Norwest Mortgage, Inc.*,⁴ a borrower challenged the bank's mortgage escrow waiver fee, a 1/4-point fee imposed upon a borrower's exercise of his statutory election to either pay his real estate

taxes into an escrow or post a savings account, under the Mortgage Escrow Account Act.⁵ The trial court dismissed the complaint as failing to state a cause of action for violation of either the Mortgage Escrow Act or Consumer Fraud Act. The appellate court reversed, holding that the escrow waiver fee was prohibited by the Mortgage Escrow Account Act, but, nonetheless, did not violate the Consumer Fraud Act. In the court's view, the defendant's actions were illegal as a matter of law, but were not unfair or deceptive:

[w]hile defendant has urged upon us a position with which we do not agree, we cannot say that such a position is the result of any 'unfair deceptive acts or practices' nor can the acts of the defendant be characterized as 'fraud, false pretense, false promise or concealment of an immaterial fact.'⁶

The court distinguished this case from the "culpable defendant" in *People v. Ex. Rel. Hartigan v. Stianos*,⁷ where the defendant had adopted a practice of charging customers sales tax in excess of the amount authorized by law. In *Stern*, Justice Greiman held that the Consumer Fraud Act prohibits deception, not error, and professed not to "reject or mean to affect those cases which have properly stated that an innocent misrepresentation can be actionable under the Consumer Fraud Act."⁸ Justice Greiman explained, [w]e do not believe that the assertion of a lender's right to an

escrow waiver fee is a *per se* violation of the Consumer Fraud Act. Although the Consumer Fraud Act has loosened the requirement of *scienter* and released the claimant of the burden of showing reliance, there must be a claim seated in deceptive acts rather than a reasonable difference of opinions as to the meaning of an Act of the Illinois General Assembly [citations omitted].

Seeming satisfied that its declaration would prospectively prevent any future frauds on these fees, Justice Greiman went on to explain that the Consumer Fraud Act would protect against a future escrow charge. "If the day after this opinion is spread of record, defendant seeks to impose such a fee upon a borrower, a different result would be obtained."⁹ Aware, perhaps of what might be perceived as a hole through which most frauds could be driven, the court hoped to limit the holding to the particular case, and stated, "[b]y this, we do not mean that every deceiver is like every dog, entitled to one bite. We mean only that these facts do not lend to an action under the Consumer Fraud Act."¹⁰

But, if Justice Greiman had hoped to simply fashion a defense for instances of innocent misinterpretations of unconstrued actions, the concept has instead become a wholesale exoneration of first-impression frauds. While *Stern* proceeded to the Illinois Supreme

Court, the rest of the appellate courts began recognizing the "first bite free" as a defense of almost anything that had not been previously adjudicated by controlling authority. Unfortunately, defendants now uniformly assert it, and the courts have applied this as a "no controlling authority" or "first bite" defense against a Consumer Fraud Act action challenging any practice that has not previously been held to be deceptive.

The Illinois Supreme Court decided a similar issue in *Lee v. Nationwide Cassel, LP*.¹¹ The supreme court allowed an almost identical exception for a loan company that had been improperly enforcing motor vehicle installment sales contracts against co-signers who were inappropriately signed as "buyers" on the contracts and placed on the vehicle titles. After holding that the practice was illegal, Justice Heiple's opinion for the court threw the lender a life raft. Where the defendant *asserted* that his misrepresentation was based upon a *mere erroneous interpretation of the statute*, the Consumer Fraud Act did not apply. Specifically, the court ruled that,

[d]efendant's alleged misrepresentation that plaintiffs were primarily liable under the contracts was based upon an erroneous interpretation of Section 18 of the Motor Vehicle Retail Installment Sales Act (815 ILCS 375/18 (West 1992)). The appellate court in *Magna Bank v. Comer*, 274 Ill. App. 3d 788, 175 Ill. Dec. 612,

600 N.E.2d 855 (1992) arrived at the same erroneous interpretation when called upon to construe the statute. Given this uncertainty about the applicable law, the pleadings here failed to adequately allege that defendant employed any deception, fraud, or misrepresentation, or engaged in the concealment, suppression, or omission of material fact, since plaintiff's immunity from liability was an unsettled question of law.¹²

The issue arose again in *Weatherman v. Gary Wheaton Bank of Fox Valley*.¹³ In *Weatherman*, the mortgage borrowers complained of two charges imposed on borrowers: (1) the unagreed cost of recording the lender's assignment of the mortgage; and (2) a charge for an escrow suspension fee (one quarter of a point to "suspend" requiring security). The trial and appellate courts in *Weatherman* both found that the escrow suspension fee was legal, but held that the practice of imposing an unagreed charge for recording the lender's assignment of its loan was not permitted. And, once again, the court held that it was the result of a "legitimate disagreement" as to an unsettled issue and freed the defendant of Consumer Fraud Act liability. "Assuming *GaryWheaton* was incorrect in its interpretation of the Escrow act, as the lender was in *Stern*, this would not prove a violation of the Consumer Fraud Act."¹⁴

Nonetheless, the appellate court did find the recording charge to be a violation of the Consumer Fraud Act

and distinguished it from *Stern*. The court stated,

[i]n [*Stern*] the lender informed the borrower of the fee and the borrower elected among his options. Here, by contrast, there was a concealment of a fact, GaryWheaton's course of conduct amply demonstrates that it designed to delay disclosure until borrowers were virtually powerless to take any action: [at the] closing. If this were, as in *Stern*, an honest dispute on statutory construction, then, as in *Stern*, it would be disclosed early, rather than late.¹⁵

The Illinois Supreme Court granted leave to appeal, and held for the Bank on both counts.¹⁶ The court held that the Bank was entitled to charge for waiving the escrow, and that the recording fee had been disclosed sufficiently to meet RESPA by a non-itemized listing of the total dollar amount of charges that would be imposed in connection with the transaction¹⁷ even though the recording charge was for a transaction, the lender's assignment of the mortgage, that was not part of the borrower's transaction.¹⁸

In another case, *Cahnman v. Agency Rent-A-Car*,¹⁹ the plaintiff challenged the car rental company's collection of an "additional driver" charge for people who were already additional drivers by statute.²⁰

Although the court initially found for the defendant without argument, the case was reconsidered and argued on

the grounds that the charge was not proscribed by the Vehicle Code. The court asserted, in *dicta*, that the result would not change even if it were to hold that the Vehicle Code does prohibit the additional charge. The court stated, "our result would not change because until now the question was at best unsettled, [citing *Stern* and *Weatherman*]."21 The court went on to explain,

[e]ven assuming arguendo that we were now to hold that section 6-305 does prohibit defendant's conduct, we would nevertheless conclude that there is no violation of the Consumer Fraud Act because until now the question was at best unsettled. [citing *Lee*, *Stern*, and *Weatherman*].22

The court essentially adopted a pure first-bite-free rule and elevated the provision to an ambiguous provision of first impression. Thus, this immunity from liability for an innocent "erroneous interpretation" of an "unsettled question of law" formed the backdrop for the supreme court's affirmation of *Stern*.

At its base, first-bite-free inappropriately restores a *scienter* requirement by the back door (requiring essentially proof of notice of a prior adjudication of deception). The whole reason this act was passed in the first place is the practical inability to even allege, let alone prove, that a seller intended to deceive. Thus, all the Consumer Fraud Act requires is a statement that is false, unfair or deceptive, coupled with a seller's

intent that the buyer rely on the statement. That is why the cases hold that even innocent misrepresentations are actionable under the Consumer Fraud Act.

In expanding *Lee*, *Stern* and *Weatherman* to a first-bite-free approach on any previously unconstrued fraud, the court has chosen a path that eviscerates the Consumer Fraud Act, and renders it a pure duplicate form of common law fraud, complete with its requirement to prove intent to defraud. The Consumer Fraud Act focuses on seller's deceptive *acts*, rather than the seller's notice, motive or intent. It reflects the legislature's recognized conscious decision to craft a cause of action intended to be broadly and liberally construed for the purpose of eradicating consumer fraud and deterring fraud. And that is why, in contrast to common law fraud, the act does not require notice nor a seller's intent to deceive in order to find an actionable violation.²³ The Consumer Fraud Act does not require that the party making the untrue statement has actual knowledge or belief that the statement is untrue and a plaintiff may recover for innocent misrepresentation.²⁴ Instead, the legislature's "love-the-sinner, hate-the-sin" focuses *intentionally* on the effect the seller's actions have on the consumer, not on whether the seller already had constructive notice that his actions were deceptive.²⁵ The fact that an action is deceptive is enough. The act does not require allegation or proof that the defendant knew the statement

was untrue or deceptive at the time it was made. The defendant need only give the consumer the statement or omission and intend the consumer to act on that statement. By focusing on whether the defendant knew or had notice of the untruth, the court has produced new requirements not present in the law.

Likewise, the first-bite-free concept imposes an insurmountable burden on the plaintiff. Without information produced from discovery, the plaintiff generally cannot know the defendant's state of mind. But, even if the defendant had such bad, purposeful knowledge, the plaintiff cannot just allege such scienter, and cannot survive a motion to dismiss necessary to enable discovery to determine the defendant's state of mind.

II. Other Noxious Judicial Add-Ons and Subtractions

Although "first bite free" ought to be relegated to the pound and put down, the legislature has itself created at least one clearly unconstitutional change.²⁶ Likewise, a host of other burgeoning exceptions to a literal reading of the Consumer Fraud Act are no less noxious viruses that threaten the clear straightforward application and enforcement of the Act. These could be inoculated by merely applying the act as it is written.

A. The "Voluntary Payment" Concept

One such exception or hurdle concept that has been contorted into a Consumer Fraud Act defense is the so-called "voluntary payment" rule. The voluntary payment rule is actually a concept of state taxation. A party that has voluntarily paid a tax or other government exaction, like city parking tickets, without "paying under protest" or otherwise reserving his rights under the statute cannot later challenge the exaction even if it is illegal for some reason.²⁷ This concept springs from the concern that a government entity's finances may be thrown into disarray if an after-the-fact finding of technical illegality can trigger severe repayment liability for publicly enacted levies. In contrast, commercial operators who engage in deceptive practices do not have similar public entity equities. As "morphed" into a Consumer Fraud Act defense, it holds that a consumer who pays a disputed charge of which he has notice may not thereafter sue to recover the charge.²⁸

The voluntary payment cases under the consumer fraud rubric are better re-categorized as merely lacking in deception. To wit, a seller's imposition of a fee that has been fully disclosed is not deceptive. It may be unfair and actionable anyway,²⁹ and it ought not to require that the consumer risk losing the rest of his goods or services in order to challenge the charge. But a deceptive charge should still be actionable and recoverable even if it was buried but technically disclosed in the statement, when the

consumer discovers the deception after having paid it. Affording commercial swindlers the same deference afforded to governmental entities unfairly elevates the former and diminishes the latter.

B. Consumer Nexus

Another judge-made hurdle is the so-called consumer nexus requirement. Under this concept, the court, having found a practice to be otherwise actionable, may nonetheless release the defendant from liability if the act or practice does not implicate "consumer protection concerns."³⁰ In *Brody v. Finch University of Health Sciences*, students were lured into enrolling in a graduate physiognomy program whose satisfactory completion would lead to admission to the full medical school program. These students were subsequently denied admission to medical school. The court found actionable deception and breach of contract, but held that claims under the Consumer Fraud Act must satisfy the "consumer nexus test." The court described this nexus:

[w]here a plaintiff attempts to allege a violation of the [Consumer Fraud] Act in a case which appears on its face to involve only a breach of contract, the relevant inquiry is 'whether the alleged conduct [involves trade practices addressed to the market generally or otherwise] implicates consumer protection concerns.'³¹

Happily, *Brody* ruled that the test was met for the unfortunate students. However, the concept is ill-applied to cases in which individual consumers are the plaintiffs, and adds a redundancy that doesn't exist in the statute.

The consumer nexus test is justifiable only where the case is brought by one business against another, for it is only where the "consumer" is a commercial enterprise that the Act's purpose of affording relief to consumers needs to be established. And indeed, that is precisely the point of applying or not applying the act in commercial plaintiff cases.³² Adding the consumer nexus as an additional hurdle to natural, individual consumers' recoveries seems at best a redundancy. After all, the plaintiff already has to be a consumer under the statute. If the consumer nexus hurdle adds anything more, it lies outside the requirements of the statute. At worst, it is the resurrection of the requirement to also show a "public injury, a pattern or an effect" that this shortlived judicial engraftment was intended to be eradicated by the 1990 amendments to the Consumer Fraud Act, "clarify[ing] the legislative intent that a plaintiff suing under the Consumer Fraud Act could state a claim based upon a single, isolated injury and based solely upon the plaintiff's own injury."³³

C. Implication of Consumer Protection Concerns

Another hurdle created by the court is the requirement that the plaintiff must plead an implication of consumer protection concerns in his complaint. Despite the finding that the students had met the consumer nexus requirement, the *Brody* court nonetheless held that plaintiffs' complaint was lacking because they failed to plead an implication of consumer protection concerns. The court explained,

plaintiffs must plead and otherwise prove (1) that their actions were akin to a consumer's actions to establish a link between them and consumers; (2) how defendant's representations regarding their cases of being accepted into defendant's medical school concerned consumers other than themselves; (3) how defendant's particular breach of denying them admission into defendant's medical school involved consumer protection concerns; and (4) how the requested relief would serve the interests of consumers. After hearing all of the testimony and reviewing the evidence, the trial court ruled that plaintiffs failed to prove that a violation of the Consumer Fraud Act occurred. Plaintiffs evidently failed to allege and prove the necessary nexus between defendant's complained-of conduct and consumer protection concerns. After reviewing the record, we find that the trial court's decision was not

against the manifest weight of the evidence.³⁴

This is at best, meaningless redundancy. A consumer who otherwise meets the Consumer Fraud Act pleading requirements has already pleaded "consumer protection concerns," his own. Like the consumer nexus requirement, this also deserves to be dispatched.

D. Exemption of Attorneys from Consumer Fraud Act Liability

In *Cripe v Leiter*,³⁵ the court created yet another exception to the Consumer Fraud Act by carving attorneys out of Consumer Fraud Act liability. In *Cripe*, an action against an attorney who had overbilled a client for allegedly overpriced and underperformed work, the Illinois Supreme Court held that lawyers are not subject to Consumer Fraud Act liability at all.³⁶ Justice Bilandic's opinion for six members of the court held that the attorney-client relationship in Illinois, "unlike the merchant-consumer relationship, is already subject to extensive regulation by this court."³⁷ The court went on to assert that,

[t]he legislature did not, in the language of the Consumer Fraud Act, specify that it intended the Act's provisions to apply to the conduct of attorneys in relation to their clients. Given this court's role in that arena, we find that had the legislature intended the Act to apply in this manner, it would

have stated that intention with specificity. Absent a clear indication by the legislature, we will not conclude that the legislature intended to regulate attorney-client relationships through the Consumer Fraud Act [citations omitted].³⁸

Judicially carving out new exceptions for professional categories not exempted by the legislature is bad new track to lay. It invites either a division of lawyers who control the system for themselves, or demands for similar exceptions for every other calling that has its own internal disciplinary provisions.

III. Fundamental Problems With Judicial Add-ons and Exceptions

Judicial creation of new exceptions and pleading requirements is wrong and for a host of reasons judicial add-ons and exceptions frustrate the legislative intent and violate separation of powers. These particular embellishments do real harm. They also act as an incentive to sellers to exploit questionable practices not yet adjudicated by the courts, and they seriously impede consumers' efforts to obtain any meaningful redress for Consumer Fraud Act harms.

A. No Basis for Conclusion of Innocence

One problem with the "First Bite Free Doctrine," in all these cases, is that

it lacks any evidentiary basis at all. The trial court in all these cases simply takes the defendant's answer, denying the allegations and arguing the innocent mistake orally, and dismisses the count without any factual presentation of evidence. The decision, thus, rests solely on the pleadings. The complaint alleges deception and the motion to dismiss professes innocence.

Justice Harrison's dissent in *Stern* castigated the court's treatment of the defendant's actions as a conclusively honest mistake, which was established at the pleadings stage and in contradiction to the way the complaint characterized the defendant's action. The dissent argued,

[i]n the matter before us, there is no dispute that escrow requirements were an important part of plaintiffs' mortgage transactions with Norwest Mortgage Company and were therefore material. Plaintiffs clearly allege that the company misrepresented or concealed, suppressed, or omitted those requirements by failing to give notice, as required by law, that they could avoid escrow without payment of a fee and by supplying plaintiffs with information about escrow accounts that was inconsistent with the law. The company obviously intended consumers such as plaintiffs to rely on its misrepresentations, suppressions, and omissions, and the consumers did so rely. According to the

complaint consumers paid the fee the company demanded even though the fee was illegal and the company had no right to collect it.³⁹

As Justice Harrison points out, there simply was no basis for conclusively finding that the mistake was innocent or not without discovery of the defendant. The defendant's knowledge, state of mind, and intent simply cannot be determined factually from the plaintiff's complaint. Consequently, the funding of innocent scienter is puzzling.

B. Frustration of Legislative Intent

Additionally, the courts' unwillingness to apply the law as written is just the kind of judicial lawmaking that frustrates the legislature's intent to craft a simple, effective tool to root out customer frauds of all types and forms. Self-proclaimed strict constructionists who frustrate the rule of law by erecting obstacles not contained in the statute are engaging in just the same sort of judicial lawmaking for which they routinely complain about judges who go beyond the law to achieve relief.

If the legislature had intended to preclude or differentiate consumer fraud actions arising on first impression fact or issues, it could have explicitly said so in the statute itself.⁴⁰ Indeed, the entire body of Illinois Consumer Fraud Act decisions, consisting almost exclusively of first impression adjudications of newly

uncovered deceptive practices, would have been reversed.⁴¹

C. Impact on Actions in the Marketplace

1. Encouragement to Novel Schemes

Immunizing the first bite reverses the Act's intended incentives. A general act that enables recoveries against any practices found to be deceptive poses a threat to commercial operators against crossing the proverbial "line" and encourages honest dealing. In contrast, first-bite-free encourages sellers to exploit every questionable practice not already adjudicated by the courts. They can take the attitude of "try everything, because liability will only result after the first decision is reported." All scams until then will produce profit that may be kept. This attitude actually encourages the creation of new consumer frauds. Since the first form of wrongdoing is given a pass on liability, it encourages defendants to push the envelope on every issue where there has been no definitive ruling already. Faced with a choice between imposing any charge, the defendant must choose to impose the charge. If he refrains from imposing the charge, he loses the revenue. If he goes ahead and imposes the charge, he gets the additional revenue, may not have to refund it at all, and has no risk of bearing the additional cost of attorney's fees unless and until imposing the charge after

someone in the first place.

2. Elimination of Incentives to Challenge Fraud

Additionally, holding that the first ruling on each deceptive practice is not actionable under consumer fraud affirmatively eliminates all incentive for consumer champions to bring actions. Since it is only under the Consumer Fraud Act that the attorney's fees' incentive is available, the first attorney to challenge a deceptive practice, and establish the legal decision of its deceptiveness, is the only one who will not be rewarded to bringing the action.

Thereafter, the only litigation that could be brought under the Consumer Fraud Act would be against other defendants who were so stupid as to proceed ahead after the decision and only for charges imposed after the decision. Thus, all deceiving mercantilists are freed of liability for all frauds done before the decision in the first case becomes final.

D. Violation of Separation of Powers

On another level, the courts' creation of new exceptions and declaration of only prospective invalidity fundamentally violates the basic concepts of separation of powers. By enacting a substantive prohibition beginning on the date of decision, the judiciary violates the separation of powers between the three branches of

government.⁴² The function of the judiciary is to interpret the law as it exists, not enact new provisions; it may not decide to carve out exceptions not enacted by the legislature. For example, in *People v. Garner*,⁴³ the prosecution argued that the law entitling a criminal defendant to an admonishment that his failure to appear waives his right to confront witnesses against him should not apply to "experienced criminals" who already know the rule and manipulate it to their advantage with a pattern of bail jumping. In refusing to create the exception for "experienced criminals," the Illinois Supreme Court stated,

[i]t is not the function of this court to determine what might be a better rule. The legislature is vested with the power to enact laws. Under the doctrine of separation of powers, courts may not legislate, rewrite or extend legislation. If the statute as enacted seems to operate in certain cases unjustly or inappropriately, the appeal must be to the General Assembly, and not to the court. [citation omitted]. Our function is to interpret and apply the law as it is announced by the legislature. In interpreting the law, it is our duty to give effect to the intent of the legislature. We are powerless to annex to a statute a provision or condition which the General Assembly did not see fit to impose [citation omitted].⁴⁴

The legislature has already

decided that it is a violation to commit a deceptive business practice and carved no exception for un-interpreted laws or defendants acting in good faith.⁴⁵ Once the court has determined that a deceptive business practice has occurred, it is the court's job to enforce it. By handling the statutes as new edicts of law upon each declaration by the courts, the court improperly usurps the legislature's authority under the Constitution. The courts' "first bite free" interpretation of the Consumer Fraud Act does just that.

The courts' declaration of only prospective invalidity violates another important related concept of separation of powers, i.e., that the courts interpret what the law is; they do not enact new law so civil decisions are strongly presumed to apply retrospectively, not just prospectively from the date of decision.⁴⁶ The applicable test is contained in *Chevron Oil Co. v. Huson*.⁴⁷ As laid out in *Chevron*, and quoted by Justice Freeman in *Aleckson*, a decision should not be limited to prospective application unless justified under all three of the following:

- i) the decision "established a new principle of law, either by overruling clear past precedent on which litigants may have relied... or by deciding an issue of first impression whose resolution was not clearly foreshadowed."
- ii) whether, given the purpose and prior history of the new rule, its operation will be retarded or promoted by prospective application, and

iii) whether prospective application is mandated by the balance of equities.⁴⁸

It is inconceivable that any of the first bite cases to date could meet that standard, but none of the courts have applied that analysis. Nonetheless, as applied to these cases, prospective-only application is antithetical to consumer protection and grossly unfair except only for those situations in which the defendant can show a published decision on which he reasonably relied. Prospectiveonly application does nothing to further the purpose of the consumer protection laws and the equities clearly favor the ignorant consumer over the aggressive business person's quest for greater profit.

IV. Conclusion

Strict construction of the laws stands as perhaps the only substantial protection of consumer rights in a time when the legislatures and courts seem inclined to whittle away at limiting consumer redress. At a time when the legislatures are under extreme pressure to cut back on liability statutes, rather than expand them, it is appropriate for the courts to recognize that strict construction of the consumer recovery statutes as written is perhaps the strongest protection against judicial vicissitudes that threaten to cut them back. When those who oppose expanding consumer rights argue that we should just enforce the current laws on the books, perhaps we should do just that.

Endnotes

¹ See 815 ILCS 505/2. The Consumer Fraud Act states,

[u]nfair methods of competitions and unfair or deceptive acts or practices, including but not limited to the use or employment of any deception, fraud, false pretense, false promise, misrepresentations or the concealment, suppression or omission of any material fact, with the intent that other rely upon the concealment, suppression or omission or omission of such material fact, ... are hereby declared unlawful whether any person has in fact been misled, deceived or damaged thereby. 815 ILCS 505/2.

The private right of action is contained in 815 ILCS 505/10a:

§10a. Action for actual damages.

(a) any person who suffers actual damage as a result of a violation of this Act committed by any other person may bring an action against such person. The court, in its discretion, may award actual economic damages or other relief which the court deems proper . . . [exceptions for vehicle dealers].

² See *Connick v. Suzuki Motor Co., Ltd.*, 174 Ill. 2d 482,, 675 N.E.2d 584, 221 Ill. Dec. 389 (1997) and *Azimi v. Ford Motor Co.*, 977 F.Supp.847 (N.D. Ill. 1997).

³ See *Recreation Services Inc. v. Odyssey Fun World Inc.*, 952 F. Supp. 594 (N.D. Ill. 1997); see also, *Falcon Associates, Inc. v. Cox*, 298 Ill. App. 3d 652, 699 N.E. 2d 203, 232 Ill. Dec. 756 (5th Dist. 1998), (innocent misrepresentations may be actionable under the Consumer Fraud and Deceptive Business Practices Act, as the key consideration is the effect of the seller's conduct, not his intent);

Randels v. Best Real Estate Inc., 243 Ill. App. 3d 801, 612 N.E. 2d 984 (2nd Dist. 1993), (Consumer Fraud Act permits consumer to recover on innocent misrepresentations or omissions).

⁴ See *Stern v. Norwest Mortgage, Inc.*, 284 Ill. App. 3d 506, 672 N.E. 2d 296 (1st Dist. 1996).

⁵ See 765 ILCS 910/1. The act holds essentially that a lender that balances itself unsecured for the payment of taxes, insurance, etc. may require the borrower to either (a) deposit a monthly amount toward the annual tax and insurance premiums or (b) post a savings account in the amount of 150% of the actual charges being secured.

⁶ See *Stern*, 284 Ill. App. 3d at 512.

⁷ 131 Ill. App. 3d 575 (1985).

⁸ See *Stern*, 284 Ill. App. 3d at 512.

⁹ *Id.*

¹⁰ *Id.*

¹¹ 174 Ill. 2d 540 (1996).

¹² *Id.* at 543.

¹³ 286 Ill. App. 3d 48 (1st Dist. 1996), rehearing denied July 1997, PLA granted, and reversed, __ Ill.2d __, 1999WL412309 (1999), petition for certiorari in process.

¹⁴ See *id.* at 64.

¹⁵ *Id.* at 64, n. 2.

¹⁶ See *Weatherman v. Gary-Wheaton Bank of Fox Valley*, 186 Ill. 2D 472, 1999 WL 412309 (1999).

¹⁷ See *id.* at *7.

¹⁸ See *id.* at *12.

¹⁹ 299 Ill. App. 3d 54, 701 N.E.2d 512 (1st Dist. 1998).

²⁰ See Illinois Vehicle Code 5/625 ILCS 5/6-305 (West 1996).

²¹ See *Cahnman*, 299 Ill. App.3d at 58.

²² See *id.*

²³ See *Martin v. Heinhold Commodities, Inc.*, 163 Ill. 2D 33, 76, 643 N.E.2d 734, 754.

²⁴ See *Beckenridge v. Cambridge Homes*, 246 Ill. App. 3d 810, 616 N.E.2d 615 (intent to deceive is not required); see also, *Ciampi v. Ogden Chrysler Plymouth, Inc.*, 262 Ill. App. 3d 94, 624 N.E.2d 448, 460 (2d. Dist. 1994) (a seller can violate the Consumer Fraud Act regardless of whether the misrepresentation was innocent).

²⁵ See *Martin*, 163 Ill.2d at 76, (courts must focus their attention upon the effect that the conduct might have on the consumer).

²⁶ Effective January 1, 1996, the legislature passed an amendment to impose a vast array of hurdles to Consumer Fraud Act claims asserted against a defendant who is a new or used vehicle dealer. The legislation, an obvious invalid special legislation under 1970 Illinois Constitution, Art. IV, §13, was passed as a result of dealer lobbying for relief after a number of dealers had found themselves forced to settle numerous class actions over gouging customers for title registration charges on cars sold by the dealers. The amendments reimpose public injury requirements, pre-suit demand obligations, opportunities to moot the litigation by settling individually, and a host of other obstacles applicable only to actions brought against a car dealer. P.A.89-144, §5, amending 815ILCS 505/10a, effective

January 1, 1996. The amendments' language is absurdly probably broad enough to protect a car dealer who engages in deceptive sales of other products, as well. See Norman, *Consumer Fraud Act Suits against Car Dealers after the Public Injury Amendment*, 84 ILL. BAR. J. 84 (Feb. 1996), a discussion of whether the sale of one car nonetheless still implicates "public" injury or interest concerns.

²⁷ See *Norton v. City of Chicago*, 293 Ill. App. 3d 620, 690 N.E.2d 119 (1st Dist. 1997), the voluntary payment doctrine provides that a payor may not recover fees voluntarily paid, without protest, even if the fees were illegal; see also, *Getto v. City of Chicago*, 86 Ill.2d 39, 48-49, 55 Ill. Dec.519, 426 N.E.2d 844 (1981); *Terra-Nova Investments v. Rosewell*, 235 Ill. App. 3d 330, 337, 176 Ill. Dec. 411, 601 N.E.2d 1109 (1992).

But a payment is not voluntary if (1) the payor lacked knowledge of facts upon which to protest payment, or (2) the payment was made under duress. See *Terra-Nova*, 235 Ill. App. 3d at 337. The voluntary payment doctrine does not apply when payment is "made under duress or compulsion." *Getto*, 86 Ill.2d at 51, 55 Ill. Dec. 519, 426 N.E.2d 844; see also *Geary v. Dominick's Finer Foods Inc.*, 129 Ill.2d 389, 395, 135 Ill. Dec. 848, 544 N.E.2d 344 (1989).

Under the doctrine, a payment is made "under duress" when the payee "exert[s] some actual or threatened power over the payor from which the payor has no immediate relief except by paying." *Terra-Nova*, 235 Ill. App. 3d at 337, 176 Ill. Dec. 411, 601 N.E.2d 1109. Or, when the product or service is regarded as a necessity in our modern society, such as to make it unreasonable duress to require the consumer to withhold payment and forego the product or service in order to have standing; *Getto* (telephone service) and *Geary* (sanitary napkins and tampons).

²⁸ See *Dreyfus v. Ameritech Mobile Communications, Inc.*, 298 Ill. App. 3d 933, 700 N.E.2d 162 (1st Dist. 1998) (consumer's "voluntary" payment of interconnect charge shown on bill barred consumer's subsequent Consumer Fraud Act action to recover the charge; cellular telephone services are not a necessity that would permit assertion of payment under "duress". See also, *Smith v. Prime Cable of Chicago*, 276 Ill. App. 3d 843, 658 N.E.2d 1325, 213 Ill.Dec. 304 (1st Dist., 1995) (cable subscriber's "voluntary payment" of bill defeated claim over charge for payper-view performance that was shorter than advertised. "Absent fraud, coercion or mistake of fact, monies paid under a claim of right to payment but under a mistake of law are not recoverable." 276 Ill. App. 3d at 847-8.

²⁹ The Consumer Fraud Act extends to actions that are unfair without being deceptive. See *Saunders v. Michigan Ave. Nat. Bank*, 278 Ill. App. 3d 307, 662 N.E.2d 602, 214 Ill.Dec. 1036 (1st Dist. 1996), PLA denied 167 Ill.2d 569.

³⁰ See *Brody v. Finch University of Health Sciences*, 298 Ill. App. 3d 146, 160, 698 N.E.2d 257, 269 (2nd Dist. 1998).

³¹ See *Brody*, 298 Ill.App. 3d at 159, citing *Lake County Grading v. Advance Mechanical Contractors, Inc.*, 275 Ill. App. 3d 452, at 459, 654 N.E.2d 1109, quoting *Downers Grove Volkswagen, Inc. v. Wigglesworth Imports, Inc.*, 190 Ill. App. 3d 524, 534, 137 Ill.Dec.409, 546 N.E.2d 33 (1989)).

³² See *Speakers of Sport, Inc. v. Proserv, Inc.*, ___ F.3d ___, 1999WL301377 (7th Cir. 1999), consumer protection interests not implicated in dispute between sports agents over pirating baseball player clients; see also *Republic Tobacco, L.P. v. North Atlantic Trading Co.*, ___ F.Supp. ___, 1999WL261712

(N.D. Ill. 1999), a smoking battle between competing importers of tobacco and rolling papers alleging patent infringement, anticompetitive conduct, tortious interference, and false and misleading and disparaging statements directed to the market that diverted sales. District Judge Grady dismissed the count brought under the Illinois Consumer Fraud Act, holding that the mere diversion of consumer sales as a claimed consumer connection "is far too indirect to satisfy the consumer nexus requirements." Slip Op. at *9. However, the court nonetheless granted leave to amend, to supply allegations of specific misrepresentations by defendants which affected a consumer or implicated consumer protection concerns, that might meet the consumer nexus requirement. *Id.*

³³ *Brody*, 298 Ill. App. 3d at 160.

³⁴ *Id.* at 160-161.

³⁵ 184 Ill.2d 185, 703 N.E.2d 100, 234 Ill.Dec. 488 (1998).

³⁶ See *id.* at 190.

³⁷ *Id.*

³⁸ *Id.*

³⁹ See *Stern*, 284 Ill. App. 3d at 510.

⁴⁰ Other states have taken this course. See e.g., WISC. STAT. ANN. §100.20(5)(West 1997) (Private cause of action for twice the amount of damages, costs and attorneys' fees may be brought for a violation of any order issued [by the Department of Justice] under this section; see also, doctrine of *expressio unius est exclusio alterius* recognized in *Baker v. Miller*, 159 Ill. 2d 249, 636 N.E.2d 551 (1994) and *County of Cook, Cermak Health Services v. Illinois State Local Labor Relations Board*, 144 Ill. 2d 326, 579 N.E.2d 866 (1991).

⁴¹ All – every one – of the landmark decisions applying the Illinois Consumer Fraud Act would have been dismissed as issues on which no controlling decision then existed. *See* *Glazewski v. Coronet Ins. Co.*, 108 Ill.2d 243, 483 N.E.2d 1263 (Ill. 1985) (complaint stated cause of action under the Consumer Fraud Act for seller’s failure to disclose that underinsured motorist coverage was almost certainly a redundancy); *Rice v. Snarlin, Inc.*, 131 Ill.App.2d 343, 266 N.E.2d 183 (1st Dist. 1970) (plaintiffs sufficiently alleged cause of action under Consumer Fraud Act where plaintiff alleged that defendant, who contracted to place plaintiff’s name on directory listing for models and send directory to five hundred companies, failed to inform plaintiffs as to the nature and type of directory listing); *Guess v. Brophy*, 163 Ill. App. 3d 75, 517 N.E.2d 179 (4th Dist. 1988) (practice of charging customers sales tax in excess of amount authorized by law was both deceptive and unfair within the meaning of the Consumer Fraud Act); *People ex rel. Hartigan v. Maclean Hunter Pub. Corp.*, 119 Ill. App. 3d 1049, 457 N.E.2d 480 (1st Dist. 1983) (because advertisements of used car pricing manual were not merely expressions of ideas but representations promoting its use, advertisements came within ambit of Consumer Fraud Act); *Exchange National Bank v. Farm Bureau Life Ins. Co. of Michigan*, 108 Ill. App. 3d 212, 438 N.E.2d 1247 (3rd Dist. 1982) (holding that Consumer Fraud Act applies to mortgage lenders); *People ex rel. Scott v. Larance*, 105 Ill. App. 3d 171, 434 N.E.2d 5 (5th Dist. 1982) (cause of action stated under Consumer Fraud Act regarding misrepresentations of odometer mileage and holding that Act is not limited to sales by business persons or merchants); *Hubert v. Cottier*, 56 Ill. App. 3d 893, 372 N.E.2d 734 (4th Dist. 1978) (holding that a defendant stated an affirmative defense under Consumer Fraud Act where contract

for home siding did not contain three-day cancellation provision); *Scott v. Assoc. for Childbirth in the Home*, 88 Ill.2d 1049, 430 N.E.2d 1012 (Ill. 1982) (holding that what is deceptive and unfair is a case by case determination; attorney general’s administrative subpoenas could be issued in order to protect consumers under the Consumer Fraud Act in action against landlord for misrepresentations and refusal of leases for the purpose of purchasing mobile homes for less than half market value and that what is deceptive and unfair is to be determined on a case by case basis). Each of these cases concerned an issue not previously settled and each would have been required to be dismissed under *Lee’s* “first fraud bite free” defense.

⁴² Article II, section 1 of the Illinois Constitution provides, “[t]he legislative, executive, and judicial branches are separate. No branch shall exercise powers properly belonging to another.”

⁴³ 147 Ill.2d 467, 590 N.E.2d 470 (1992).

⁴⁴ *Garner*, 147 Ill.2d at 475-76, 590 N.E.2d at 474; *see also*, *Miller v. Sears, Roebuck & Co.*, 148 Ill. App. 3d 1022, 1025, 500 N.E.2d 557, 559 (1st Dist. 1986) (court’s function is to declare and enforce the law as enacted by the legislature and interpret the language when necessary but not enact new provisions or substitute different ones), overruled on other grounds, *Whitaker v. Lian Feng Machine Co.*, 156 Ill. App. 3d 316, 509 N.E.2d 591 (1st Dist. 1987); and *see* *Ralston v. Plogger*, 132 Ill. App. 3d 90, 98, 476 N.E.2d 1378, 1383 (4th Dist. 1985) (court’s only legitimate function is to declare and enforce the law as enacted by the legislature, to interpret the language when necessary, and not to enact new provisions or substitute different ones).

⁴⁵ *See* *Martin* 163 Ill.2d at 76, 643 N.E.2d at 754, (good or bad faith is irrelevant under

the Consumer Fraud Act); *see also*, *Ciampi*, 262 Ill. App. 3d 94, 111, 634 N.E.2d 448, 460 (2nd Dist. 1994) (holding that “innocent” defendants may be liable for a statutory fraud violation).

⁴⁶ *See* *Aleckson v. Village of Round Lake Park*, 176 Ill.2d 82, 679 N.E.2d 1224, 223 Ill. Dec. 451 (1997); *Deichmueller Construction Co. v. Industrial Comm.*, 151 Ill.2d 413, 416, 177 Ill.Dec. 446, 603 N.E.2d 516 (1992).

⁴⁷ 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971) (holding that an injured party who had relied on an earlier decision’s interpretation of the limitations period should not be barred by a postinjury decision that had the effect of shortening the limitations period).

⁴⁸ *See Chevron*, 404 U.S. at 106-7.

CLR