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Does the Consumer Fraud Act Require Proof of Reliance?

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FEATURE ARTICLE

Does The Consumer Fraud Act Require Proof of Reliance?

by Edward X. Clinton, Jr.

The Consumer Fraud and Deceptive Business Practices Act ("the Act") prohibits misleading and deceptive business practices in connection with any trade or business.[1] The legislature's purpose was to help consumers obtain remedies against businesses for deceptive sales practices.[2] The legislature accomplishes its purpose through the Act by eliminating the requirement that the plaintiff must prove a defendant intended to defraud. Additionally, prevailing plaintiffs are allowed to recover attorney's fees.[3] Some courts hold that consumers need not show reliance to prevail under the Act; however, other courts disagree. This article explores the split in the courts and explains how the Illinois Supreme Court's decision in *Martin v. Heinold Commodities*[4] has implied a tentative resolution to the debate.

I. The Reliance Debate

Illinois courts are sharply divided over whether proof of reliance is necessary to state a claim under the Act. Two types of claims exist under the Act: a claim based upon a misrepresentation and a claim based upon an omission of a material fact. The Act treats each type of claim differently:

> Unfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use or employment of any deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact, or the use or employment of any practice described in Section 2 of the 'Uniform Deceptive Trade Practices Act,' approved August 5, 1965, in the conduct of any trade or commerce are hereby declared unlawful whether any person has in fact been misled, deceived or damaged thereby.[5]

This section requires proof of reliance where a plaintiff relies on an omission or concealment of a material fact.[6] However, the section contains no such requirement for misrepresentation cases.

Several courts listed the elements of a misrepresentation claim as follows:

> To recover under the Act, a plaintiff must prove that: (1) a statement by the seller; (2) of an existing or future material fact; (3) that was untrue, without regard to defendant's knowledge or lack thereof of

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such untruth; (4) made for the purpose of inducing reliance; (5) on which the victim relies; and (6) which resulted in damages to the victim.[7]

To the contrary, the First District Appellate Court of Illinois eliminated the reliance requirement and held that a plaintiff "need not show actual reliance nor diligence in ascertaining the accuracy of the misstatements."[8]

II. The Illinois Supreme Court's Decision in Siegel v. Levy

In *Siegel v. Levy Org. Dev. Co.*, the Illinois Supreme Court stated that "significantly, the Act does not require actual reliance."[9] This statement appears to resolve the reliance debate. However, the Supreme Court's statement in *Siegel* may have been *dicta*. In *Siegel*, the plaintiff brought actions for common law and consumer fraud. The trial court granted summary judgment for the defendant on both counts. The appellate court reversed on the fraud count, finding disputed issues of fact, but affirmed the dismissal of the consumer fraud count. The Illinois Supreme Court, in turn, reversed the appellate court and reinstated the consumer fraud count. The court held that "facts satisfying a claim for common law fraud will necessarily satisfy a claim under the Act."[10]

The pronouncement in *Siegel* concerning reliance may be *dicta* because the parties did not argue whether a plaintiff must allege reasonable reliance under the Act. The *Siegel* court determined that the elements for proof of a consumer fraud count are subsumed in the elements of common law fraud. If a plaintiff can prove fraud, the plaintiff must satisfy all elements of a consumer fraud action as well. Thus, even if the Act required proof of reliance, the *Siegel* court would have reached an identical result. Therefore, the Illinois Supreme Court has not heard argument on whether the Act requires proof of reliance.

However, in *Martin v. Heinold Commodities, Inc.*, a consumer fraud case, the Supreme Court of Illinois quoted *Siegel* and stated that the Act does not require proof of reliance.[11] Thus, it appears well-settled that a consumer plaintiff need not prove she relied on a defendant's statements in order to prove consumer fraud under the Act.[12]

III. Post-Siegel Confusion Among The Appellate Courts

Even after the *Siegel* court stated that a plaintiff need not prove reliance, one appellate decision held that private plaintiffs must prove reliance. In *Elipas Enters., Inc. v. Silverstein*,[13] the plaintiff's complaint was dismissed for failure to allege reasonable reliance. *Elipas* distinguished *Siegel* on the ground that the Act allows the Attorney General to file enforcement suits and that the Attorney General should not be required to prove that he relied on a defendant's statements.[14] According to the First District Appellate Court, a private party must establish reasonable reliance.

In *Siegel* and *Martin*, the plaintiffs were private parties, as was the plaintiff in *Elipas*. Therefore, the distinction drawn in *Elipas* between private parties and the Attorney General does not make sense. If the Supreme Court had wanted private plaintiffs to prove reliance, it surely would have said so. Furthermore, the Third District has rejected *Elipas*. In *Zinser v. Rose*, that court held there is no requirement that a plaintiff prove reliance.[15] In the present context, *Elipas* cannot be good law. Until the Supreme Court overrules or limits *Siegel* and *Martin*, plaintiffs need not allege or prove reliance.

IV. Loss Causation

Even if a plaintiff need not prove reliance, the Supreme Court has clearly held that a plaintiff must prove proximate causation to recover damages. In *Martin*, the plaintiffs purchased commodities from the defendant broker. The plaintiffs claimed they were defrauded when the broker misrepresented the nature of a "foreign service fee."[16] According to the plaintiffs, the fee was actually a commission. The Supreme Court, following federal securities cases, held that the plaintiffs were required to prove both transaction and loss causation. "Transaction causation" means "the investor would not have engaged in the transaction had the other party made truthful statements at the time required." "Loss causation" means that "the investor would not have suffered a loss if the facts were what he believed them to be."[17]

Even if a plaintiff need not prove reliance, the Supreme Court has clearly held that a plaintiff must prove proximate causation to recover damages.

Thus, to recover under the Act, a plaintiff need not prove reliance, but rather, must prove transaction and loss causation. As a practical matter, proving transaction causation is almost identical to proving reliance because a plaintiff must demonstrate that he would not have purchased a good or service had he known the true facts. For example, a plaintiff who does not listen to what the defendant tells him about a product or service has not relied on defendant's statement. The same plaintiff cannot demonstrate transaction causation because he did not listen to what the defendant said.

For a second example, assume that a plaintiff visited a defendant's showroom to purchase a snowmobile. During the sales presentation, the plaintiff did not listen when the sales representative explained that the snowmobile was two years old and had been driven 1,000 miles on an Illinois farm. (In reality, the snowmobile was seven years old and had been driven 20,000 miles through the Canadian Rockies). The plaintiff, in fact, purchased the snowmobile because he admired its color–red, but recall that the plaintiff did not listen to the sales representative's statement about the age and history of the machine. The plaintiff's purchasing decision, therefore, did not rely on the false statement. The plaintiff could not demonstrate transaction causation because the plaintiff would have purchased the snowmobile for its red color even if the salesperson had told the truth. Thus, the transaction causation requirement is essentially identical to a reliance requirement.

The loss causation requirement provides an additional check on a consumer fraud claim. As an example, assume that a plaintiff entered a car dealership to purchase a used car. The salesperson told the plaintiff that the car has been driven 10,000 miles and was in mint condition. Based upon these statements, the plaintiff purchased the car for $12,000. Later, the plaintiff discovered the car had recently completed a career as a Chicago taxicab, logging over 100,000 miles. The plaintiff has established transaction causation because the plaintiff would not have purchased the car if she had known the true mileage. The plaintiff also has suffered a loss, and she can prove loss causation because her car is worth less than she thought it was. If her belief that the car had been driven for only 10,000 miles was accurate, the plaintiff would not have suffered a loss.

In *Martin*, by contrast, the plaintiffs alleged that the defendant was responsible for all of their losses in the commodities market. In this case, the plaintiffs purchased commodities from the defendant broker. After suffering substantial losses, the plaintiffs claimed that they were defrauded when the broker misrepresented the nature of a "foreign service fee" as merely an additional transaction expense, rather than what it actually was—a commission. The fee, however, only accounted for a small portion of the plaintiffs' losses. A drop in the value of commodities, a typical investment loss caused the majority of losses. The plaintiffs demonstrated transaction causation, but they could not demonstrate loss causation as to the market losses because they would have lost money in the market even if the commission had been a genuine "foreign service fee." The loss causation prong separated the losses attributable to the defendant and, the concealed fee from those attributable to the risky commodities market.[18]

V. Conclusion

Although it appears well-settled that a plaintiff need not prove reliance to state a misrepresentation claim under the Act, a plaintiff must prove transaction and loss causation. The transaction causation requirement is essentially a reliance requirement. Thus, the reliance debate in the cases is merely one of semantics. Indeed, it is hard to imagine awarding a recovery to a plaintiff who did not rely on the defendant's statements. Requiring plaintiffs to prove transaction and loss causation ensures that only plaintiffs who are actually damaged by a defendant's conduct can recover in court.

ENDNOTES

1 815 ILL. COMP. STAT. ANN. § 505/1-12 (West 1992 & Supp. 1996).

2 *See, e.g.*, Ekl v. Knecht, 585 N.E.2d 156, 163 (Ill. App. 2d Dist. 1991).

3 *See* Ciampi v. Ogden Chrysler Plymouth, Inc., 634 N.E.2d 448, 460 (Ill. App. 2d Dist. 1994).

4 643 N.E.2d 734 (Ill. 1994).

5 815 ILL. COMP. STAT. ANN. § 505/2 (West 1992 & Supp. 1996).

6 *See, e.g.*, Totz v. Continental Du Page Acura, 602 N.E.2d 1374, 1382 (Ill. App. 2d Dist. 1992).

7 Malooley v. Alice, 621 N.E.2d 265, 268 (Ill. App. 3d Dist. 1993) (quoting Roche v. Fireside Chrysler-Plymouth, Mazda,

Inc., 600 N.E.2d 1218, 1227 (Ill. App. 2d Dist. 1992)); *see also Ciampi*, 634 N.E.2d at 460 (reliance required); Kleidon v. Rizza Chevrolet, Inc., 527 N.E.2d 374, 376 (Ill. App. 1st Dist. 1988) (reliance required); Bercoon, Weiner, Glick and Brook v. Mfrs. Hanover Trust Co., 818 F. Supp 1152, 1159 (N.D. Ill. 1993) (reliance required).

[8] Harkala v. Wildwood Realty, Inc., 558 N.E.2d 195, 199 (Ill. App. 1st Dist. 1990); Elder v. Coronet Ins. Co., 558 N.E.2d 1312 (1st Dist. 1990) (same).

[9] 607 N.E.2d 194, 198 (Ill. 1992).

[10] *Id.* at 198; Washington Courte Condominium v. Washington Golf Corp., 643 N.E.2d 199, 222 (Ill. App. 1st Dist. 1994); *See also* Edward X. Clinton, Jr., *Recent Decision Under The Illinois Consumer Fraud and Deceptive Business Practices Act*, 7 DePaul Business Law Journal 351, 354 (1995).

[11] 643 N.E.2d 734, 754 (Ill. 1994).

[12] Is a plaintiff in a misrepresentation case required to show that defendant made the statement for the purpose of inducing reliance? Several appellate courts have listed such an element. *See* cases cited *supra* note 7; Eshaghi v. Hanley Dawson Cadillac Co., 574 N.E.2d 760, 764 (Ill. App. 1st Dist. 1991). Although neither *Siegel*, 607 N.E.2d 194, nor *Martin*, 643 N.E.2d 734, addressed this specific issue, it appears that a plaintiff need not prove this element in a misrepresentation case.

[13] 612 N.E.2d 9 (Ill. App. 1st Dist. 1993).

[14] *Id.* at 12.

[15] 614 N.E.2d 1259 (Ill. App. 3d Dist. 1993); Celex Group, Inc. v. The Executive Gallery, Inc., 877 F. Supp. 1114, 1128 (N.D. Ill. 1995) (following Zinser and rejecting Elipas as contrary to *Siegel*, 607 N.E.2d 194; no proof of actual or justifiable reliance required).

[16] *Supra* note 12 at 739, 747.

[17] *Supra* note 12 at 747 (quoting LHLC Corp. v. Cluett, Peabody & Co., 842 F.2d 928, 931 (7th Cir. 1988)).

[18] *Supra* note 12 at 748; *see also* Adler v. William Blair & Co., 648 N.E.2d 226, 234-35 (Ill. App. 1st Dist. 1995), *appeal denied*, 163 Ill. 2d 547 (1995) (affirming dismissal of plaintiffs' complaint where plaintiffs could not demonstrate that the alleged misrepresentations had anything to do with plaintiffs' investment losses in certain real estate partnerships).

Editor's note:

by Ray Chao
Editor in Chief

The following feature article, "Assessing Hospital Cooperation Laws" by Professor James F. Blumstein originally appeared in the Reporter's Special Symposium Issue of the Loyola University Chicago School of Law Institute for Consumer Antitrust Studies, Vol. 8, Issue 2.

In that issue, however, the author's acknowledgments and a table were inadvertently omitted from the text. Therefore, the Reporter is proud to re-print Professor Blumstein's article in full with our sincere apologies to the author, the Robert Wood Johnson Foundation, Allis Dale Gillmor, and our readers.

For more information on the Symposium issue or the Institute for Consumer Antitrust Studies, please contact the Loyola Consumer Law Reporter.