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The Effect of *Laughlin v. Evanston Hospital* on Consumer Fraud Act Claims For Nondeceptive Unfair Acts or Practices

by Laurence M. Landsman

Tucked away like an old family secret, the Illinois Supreme Court's 1990 decision in *Laughlin v. Evanston Hospital*,¹ which addresses the Illinois Consumer Fraud and Deceptive Business Practices Act (the "CFA"),² has achieved a unique status. Lower courts so underwhelmed by *Laughlin* not only ignore its precedential value, they fail to acknowledge its very existence.³ The result is a fractured reading of the CFA, leaving several state appellate courts at odds with the Illinois Supreme Court.

Prior to *Laughlin*, case law interpreting section 2 of the CFA⁴ developed three distinct types of violations: (1) nondeceptive unfair acts or practices;⁵ (2) deceptive acts or practices;⁶ and (3) unfair methods of competition.⁷ The *Laughlin* decision significantly restricts the CFA's scope by limiting the statute's protections only to conduct that defrauds or deceives consumers or others.⁸ However, *Laughlin's* abolition of "nondeceptive unfair acts or practices" as violations of the CFA failed to produce an outpouring of either protest or support. Rather, with a few notable exceptions, subsequent appellate opinions have spurned

Laughlin without even a citation and have continued the more traditional notion that nondeceptive unfair conduct violates the CFA.⁹

After reviewing the pre-*Laughlin* standards for asserting CFA claims based on nondeceptive unfair acts or practices, this article details the *Laughlin* opinion as well as its impact—and lack thereof—on subsequent decisions. Finally, this article urges the Illinois appellate courts to address their differences with *Laughlin* and suggests that the Illinois Supreme Court clarify that deception is not a necessary element to asserting a CFA claim.

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I. PRE-LAUGHLIN APPLICATIONS OF THE CONSUMER FRAUD ACT

The Consumer Fraud Act¹⁰ declares unlawful:

[U]nfair 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 concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact

The legislature's decision to leave the phrases "unfair acts or practices" and "unfair methods of competition" undefined has been readily acknowledged as appropriate.¹¹ These terms are "inherently insusceptible of precise definition," and accepted wisdom has found futility in attempting "to anticipate and enumerate all the [unfair] methods and practices that fertile minds might devise."¹²

Although the CFA leaves these terms undefined, Illinois courts section 2 of the CFA¹³ provides guidelines for applying the statute to particular fact scenarios. Specifically, section 2 states that courts shall construe its terms with consideration given to interpretations of section 5(a) of the Federal Trade Commission Act ("FTCA").¹⁴ Moreover, federal courts interpreting the FTCA have found the term "unfair" to have "a venerable history of interpretation and definition . . . and now can be said to have a well-settled meaning in Federal trade-regulation law."¹⁵ Thus, prior to *Laughlin*, Illinois case law readily accepted federal interpretations of the FTCA as the guidepost in applying the CFA to state claims.¹⁶

A. Pre-*Laughlin* Illinois Law Adopted Federal Interpretations of Unfair Acts or Practices

Federal law authorizes the Federal Trade Commission ("FTC") to proscribe practices as unfair or deceptive regardless of their effect on competition, subject to deferential judicial review.¹⁷ In *FTC v. Sperry and Hutchinson Co.*,¹⁸ the United States Supreme Court adopted the FTC's criteria to determine whether conduct, unfettered by allegations that it is either anticompetitive or deceptive, is nonetheless unfair.¹⁹ The following factors have become known as the "S & H Criteria":²⁰

- (1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise — whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness;
- (2) whether it is immoral, unethical, oppressive, or unscrupulous; and
- (3) whether it causes substantial injury to consumers (or competitors or other business).²¹

The Illinois Supreme Court adopted the S & H Criteria in *Scott v. Association for Childbirth at Home, International*.²² In *Scott*, the court recognized that the term "unfair" is "inherently insusceptible of precise definition . . . [and that] effective regulation requires that the concept be flexible, defined on a case-by-case basis."²³ The court cited *Sperry* to conclude that the terms "unfair acts or practices" and "unfair methods of competition" were sufficiently definite and well

established.²⁴

In noting CFA violations, several Illinois decisions cite *Scott* as well as *Sperry*.²⁵ Thus, the pre-*Laughlin* standard appeared to use the S & H Criteria as a fixture for CFA analysis.²⁶ However, without any meaningful explanation, *Laughlin* abandoned these principles and splintered the cohesive interpretations of the CFA.

II. LAUGHLIN V. EVANSTON HOSPITAL AND ITS PROGENY

A. *Laughlin v. Evanston Hospital*

In *Laughlin v. Evanston Hospital*,²⁷ the trustees for two union health plans filed a class action complaint against several Chicago-area hospitals on behalf of similarly situated third-party health insurance providers who indemnified or insured patients for the cost of hospital services.²⁸ Their two-count complaint alleged that the defendants violated the Consumer Fraud Act and the Illinois Antitrust Act (the "Antitrust Act")²⁹ by engaging in anticompetitive pricing practices.

In particular, each defendant hospital charged all third-party payors, including the plaintiffs, the same fee for all services. However, each defendant had a similar contract with Health Care Services Corporation, the administrator of the Illinois Blue Cross Plan ("Blue Cross"), that provided for an annual reconciliation of accounts between the defendants and Blue Cross.³⁰ Pursuant to these contracts, Blue Cross made periodic payments to each defendant based upon the hospitals' posted charges. However, if the total of Blue Cross' interim payments during the course of the year exceeded 105% of the hospital's actual costs for the services provided, the amount in excess was returned.³¹ Thus, the

agreement with Blue Cross limited each defendant to a 5% profit.³² The Illinois Department of Insurance approved the contracts, making them a matter of public record.³³

The plaintiffs alleged that Blue Cross was the only third-party payor with such an arrangement with the defendants. As such, the plaintiffs claimed that the contracts violated the CFA and the Antitrust Act³⁴ because the defendants ultimately charged Blue Cross less than the plaintiffs for the same hospital services.³⁵

The trial court dismissed both counts of the plaintiffs' complaint for failure to state causes of action.³⁶ The appellate court reversed the dismissal of the Antitrust Act claim, finding that price discrimination can violate the Antitrust Act if it unreasonably restrains trade.³⁷ However, the court affirmed the dismissal of the CFA claim. Specifically, it concluded that material deception does not exist where a buyer alleges that he was unaware that his seller, in a contract of public record, granted a competitor a lower price for services.³⁸ Moreover, the court was unpersuaded that the defendants' conduct was unfair. It found no authority that prohibited a seller from charging different customers different prices or from granting bigger discounts to volume buyers on a basis other than cost savings.³⁹

The Illinois Supreme Court reversed the appellate court's ruling on the Antitrust Act claim, finding that the Antitrust Act resembles the federal antitrust Sherman Act⁴⁰ more closely than the Clayton Act.⁴¹ In a ruling with significant repercussions for CFA claims, the supreme court interpreted the Antitrust Act in conformity with its federal counterpart—and contrary to the Clayton Act—to hold that the state statute did not prohibit nonpredatory price discrimination.⁴²

Next, the supreme court addressed the plain-

tiffs' allegation that the defendants' price discrimination violated the CFA as an unfair method of competition.⁴³ Denying the claim's validity, the supreme court refused to hold the defendants liable under the CFA for alleged federal-type antitrust conduct, e.g., nonpredatory price discrimination as prohibited by the Clayton Act that did not violate the Antitrust Act.⁴⁴ To hold otherwise, would allow improper use of the CFA as an "additional enforcement mechanism of the antitrust legislation."⁴⁵ The state supreme court then broadly held, without limitation to unfair methods of competition that "[t]he language of the Act shows that its reach was to be limited to conduct that defrauds or deceives consumers or others."⁴⁶ Thus, as specifically condemned by the concurring opinion,⁴⁷ the supreme court eliminated nondeceptive unfair acts and practices as violations of the CFA.

B. Post-*Laughlin* Cases

Remarkably, several appellate court decisions rendered after *Laughlin* refused to acknowledge its holding as precedent. In *Elder v. Coronet Insurance Co.*,⁴⁸ a decision rendered seven months after *Laughlin*, the First District applied the S & H Criteria to find that the defendant insurance company's sole reliance on polygraph tests in denying insurance claims was a nondeceptive unfair trade practice under the CFA.⁴⁹ Notably, the court failed to discuss or even cite *Laughlin*. Subsequently, in *People ex rel. Hartigan v. Knecht Services, Inc.*,⁵⁰ the Second District applied the S & H Criteria to hold that the defendant violated the CFA by engaging in unfair practices.⁵¹ The *Knecht* opinion acknowledged that the determination of an unfair practice under the CFA is distinct from a finding of a deceptive practice.⁵² Again, the court did not attempt to distin-

guish *Laughlin* or even acknowledge its existence.

In the ensuing years, no less than six additional published opinions rendered by the First and Second Districts applied the S & H Criteria to find that unfair acts or practices violated the CFA.⁵³ Most recently, *Saunders v. Michigan Avenue National Bank*⁵⁴ specifically noted that a plaintiff may allege nondeceptive unfair conduct as a separate violation of the CFA.⁵⁵ Yet, neither *Saunders* nor the other cases even mentioned *Laughlin*.⁵⁶

At the other end of the spectrum, the Fifth District adopted the Illinois Supreme Court's deception requirement without question or analysis in *Sullivan's Wholesale Drug Co. v. Faryl's Pharmacy, Inc.*⁵⁷ The plaintiff in *Sullivan's* alleged that the defendant nursing home violated the CFA by failing to inform the home's residents that it kept 15% of the amount charged for prescriptions filled by another pharmacy.⁵⁸ The court embraced *Laughlin* by opining that the Illinois Supreme Court "has now held quite explicitly that, unlike the Federal law, the reach of the Consumer Fraud Act is limited to conduct that defrauds or deceives consumers or others."⁵⁹

Federal cases interpreting Illinois law are similarly adrift.⁶⁰ Most poignant is *Kedziora v. Citicorp National Services, Inc.*,⁶¹ in which the court concluded:

"It is hard to know which is more puzzling: *Laughlin's* reading of the statute or *Knecht's* and *Elder's* disregard of *Laughlin*. Those two Appellate Districts do not distinguish *Laughlin*. Instead, they plainly ignore it, looking instead to the *Sperry & Hutchinson* analysis under the federal statute."⁶²

Compelled to follow the *Laughlin* court's in-

terpretation of state law, in *Kedziora*, the court held that CFA claims required a showing of deception.⁶³

The rift created by the post-*Laughlin* cases implies one of two conclusions. Either the First and Second Districts act independently, without regard to the doctrine of *stare decisis*, or there is a need to clarify for litigants and trial courts that nondeceptive unfair acts or practices are still considered violations of the CFA.

The appellate courts should continue to stand as a strong line of defense on behalf of consumer rights. However, for this to preserve, they should address their differences with *Laughlin* head-on. Otherwise, the risk exists that trial courts will continue to be faced with the unenviable choice of rejecting precedent within their own districts or repudiating the Illinois Supreme Court opinion. The ultimate responsibility to clarify the scope of the CFA's protections rests with the Illinois Supreme Court.

III. THE STATE SUPREME COURT SHOULD CLARIFY THAT NONDECEPTIVE UNFAIR CONDUCT REMAINS A VIOLATION OF THE CFA

The court in *Laughlin* appears concerned about attempts which circumvent the Antitrust Act's perceived limitations by exploiting the CFA. The court, however, reacted by emasculating the CFA's reach and purpose, e.g., proverbially throwing the baby out with the bath water.⁶⁴ It is time for the court to restore validity to its authority in the consumer fraud arena by reaffirming that consumers retain the CFA's protections against nondeceptive unfair acts or practices and that only unfair methods of competition based on Clayton Act violations require deception under the CFA.

A. *Laughlin's* Stated Purpose Is Unrelated To Nondeceptive Unfair Conduct

The court's attempt to prevent the CFA from becoming an "additional antitrust enforcement mechanism" only has relevance to the CFA provision prohibiting unfair methods of competition. In particular, the plaintiffs in *Laughlin* sought to have the defendants held liable under the CFA for conduct which the court previously found to be not actionable under the Antitrust Act.⁶⁵ Thus, the court faced the self-described dilemma of effectively expanding the scope of Illinois' antitrust laws to include Clayton Act violations by declaring that the CFA covered the challenged conduct.

The CFA is to be construed in accordance with the FTCA.⁶⁶ Therefore, the plaintiff's argument possessed support. In addition, conduct prohibited by the FTCA's ban on unfair methods of competition has been interpreted to include nonpredatory price discrimination as defined in the Clayton Act.⁶⁷ Thus, in the court's view, the logical application of the CFA's prohibition against unfair methods of competition would include banning Clayton Act violations.

The court in *Laughlin*, however, in an effort to prevent the CFA from becoming an "additional antitrust enforcement mechanism" sought to differentiate CFA claims based on unfair methods of competition from the statute's federal counterpart. That goal would have been achieved merely by declaring that deception is an element of CFA actions premised on unfair methods of competition involving Clayton Act violations. The court, however, went beyond its stated purpose by holding that all CFA claims require an element of deception. Clearly, preventing legiti-

mate actions for nondeceptive unfair conduct did not remedy the court's use of the CFA to unduly expand the state's antitrust legislation.

B. *Laughlin* is Contrary to the CFA's Purpose

The court's stated rationale for limiting the CFA seems strained. Initially, the court cited the CFA's title to support its holding. The title states that the CFA's enactment occurred in order to "protect consumers and borrowers and businessmen against fraud, unfair methods of competition and unfair or deceptive acts or practices."⁶⁸ Inexplicably, there is no discussion as to how this title, which includes the phrase "unfair or deceptive acts or practices," supports the absolute requirement for deception. In addition, the court determined that various sections of the CFA which prohibit specific conduct all include fraud.⁶⁹ However, unlike the provision regarding unfair methods of competition and unfair acts or practices, none of these sections is grounded in the FTCA.

C. *Laughlin's* Holding is Contrary to Historical CFA Construction

The court's failure to limit the deception requirement to CFA claims premised upon unfair methods of competition undermines the liberal construction afforded to the CFA.⁷⁰ Moreover, both Congress and the Illinois legislature specifically left the concept of "unfair" open for interpretation, thus, to be determined on a case-by-case basis. Pre-*Laughlin* cases found the application of the S & H Criteria appropriate. Yet, *Laughlin* effectively nullified the value of the opinions of the legislature and the courts. By not addressing these prior interpretations, the

court failed to develop a justifiable rationale for requiring a plaintiff asserting a CFA claim based on an unfair act or practice to also prove deception.

D. *Laughlin* Needlessly Contradicts Prior Illinois Supreme Court Decisions

Laughlin's hostility toward its own prior decisions is unwarranted. The decision did not discuss *Scott* an opinion necessarily invalidated by *Laughlin* which specifically adopted the S & H Criteria to evaluate whether a nondeceptive unfair act or practice in violation of the CFA exists.⁷¹

Moreover, *Laughlin* summarily disposed of *Fitzgerald*⁷² on the largely irrelevant basis that it involved a complaint by third-party consumers alleging that the defendant had engaged in deceptive conduct.⁷³ This distinction misapprehends the prior decision. Like *Laughlin*, the *Fitzgerald* court did not allow provisions of the Clayton Act to become state antitrust violations "through the 'Back Door' of the Consumer Fraud Act."⁷⁴ Further, the court decided that, although every violation of the Clayton Act was not an unfair or deceptive practice, the state legislature had not expressly or by implication rejected similar legislation.⁷⁵ Thus, because anticipating all methods of unfair competition would be futile, the *Fitzgerald* holding stated that Clayton Act violations can also violate the CFA.⁷⁶

It is apparent that, the *Laughlin* court should have limited its holding to requiring deception only for claims of unfair methods of competition involving Clayton Act violations. Thus, in doing so no conflict among the various decisions addressing these issues would exist.

E. The Future of *Laughlin*

To the extent the court felt obligated to prevent the CFA from becoming an additional anti-trust enforcement mechanism, *Laughlin* should have expanded on *Fitzgerald*, not avoided it. The court should have ruled that only unfair methods of competition premised upon Clayton Act violations require an element of deception. The court should have then affirmatively stated that any other type of unfair method of competition, and all unfair acts or practices, remain CFA violations regardless of any attendant deception. By so holding, the court would have shown that it stood squarely behind consumers in their continual struggle against the new and reoccurring methods of unfair acts or practices.

IV. CONCLUSION

Appellate courts have correctly separated nondeceptive unfair acts or practices as a discreet violation of the CFA. However, they perpetuate the "puzzlement" over CFA application by failing to address *Laughlin*. These courts should explain their decisions so as to provide guidance to trial courts, comfort for aggrieved consumers, and send a message to those who would treat consumers unfairly. Moreover, the Illinois Supreme Court should explain that the CFA continues to prohibit nondeceptive unfair acts or practices and that only unfair methods of competition involving Clayton Act violations require some degree of deception. If these points are clarified, consumers will continue to seek relief for nondeceptive unfair acts or practices, as was intended.

E N D N O T E S

¹ 550 N.E.2d 986 (Ill. 1990).

² 815 ILL. COMP. STAT. 505/1-12 (West 1984).

³ See *infra* Part II.B.

⁴ See *infra* Part I.

⁵ See *Scott v. Association for Childbirth at Home, Int'l.*, 430 N.E.2d 1012 (1981); *People ex rel. Fahner v. Testa*, 445 N.E.2d 1249 (1st Dist. 1983); *People ex rel. Fahner v. Hedrich*, 438 N.E.2d 924 (2nd Dist. 1982); *Perrin v. Pioneer Nat'l Title Ins. Co.*, 404 N.E.2d 508 (1st Dist. 1980).

⁶ See *Carl Sandburg Village Condominium Ass'n No. 1 v. First Condominium Dev. Co.*, 557 N.E.2d 246 (1st Dist. 1990).

⁷ See *Fitzgerald v. Chicago Title & Trust Co.*, 380 N.E.2d 790 (1978).

⁸ *Laughlin*, 550 N.E.2d at 993.

⁹ See *Griffen v. Universal Casualty Co.*, 654 N.E.2d 694, 703 (1st Dist. 1995); *Golembiewski v. Hallberg Ins. Agency, Inc.*, 635 N.E.2d 452, 459-60 (1st Dist.), *cert. denied*, 642 N.E.2d 1278 (1994); *Jones v. Universal Casualty Co.*, 630 N.E.2d 94 (1st Dist. 1994); *Totz v. Continental DuPage Acura*, 602

N.E.2d 1374 (2nd Dist. 1992); *Ekl v. Knecht*, 585 N.E.2d 156, 163 (2nd Dist. 1991); *Elder v. Coronet Ins. Co.*, 558 N.E.2d 1312 (1st Dist. 1990).

¹⁰ 815 ILL. COMP. STAT. 505/2(a) (West 1984).

¹¹ *Scott*, 430 N.E.2d at 1018-19. See also *Hedrich*, 438 N.E.2d at 927; *Testa*, 445 N.E.2d at 1252.

¹² *Scott*, 430 N.E.2d at 1018 (quoting *Fitzgerald*, 380 N.E.2d at 794 (citation omitted)).

¹³ 815 ILL. COMP. STAT. 505/2 (West 1984).

¹⁴ 15 U.S.C. § 45(a)(1) states: "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful."

¹⁵ *Scott*, 430 N.E.2d at 1018.

¹⁶ See *supra* note 5.

¹⁷ *Perrin*, 404 N.E.2d at 513; *American Fin. Servs. v. FTC*, 767 F.2d 957, 968-69 (D.C. Cir. 1985). The FTCA similarly leaves the term "unfair" to be defined by the FTC and the courts. The House Conference Report on Section 5 of the FTCA succinctly stated:

It is impossible to frame definitions which embrace all unfair practices. there is no limit to human inventiveness in this field. Even if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin over again. If Congress were to adopt the method of definition, it would undertake an endless task.

H.R. CONF. REP. NO. 1142, 63rd Cong., 2d Sess. 19 (1994). See also S. REP. NO. 597, 63rd Cong., 2d Sess. 13 (1994).

¹⁸ *FTC v. Sperry and Hutchinson Co.*, 405 U.S. 233 (1972).

¹⁹ *Id.* at 245 n.5 (quoting *Statement of Bases and Purpose of Trade Regulation Rule 408, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking*, 29 Fed. Reg. 8355 (1964)).

²⁰ *American Fin. Servs.*, 767 F.2d at 971.

²¹ In 1980, the FTC issued a policy statement that set forth a new standard for identifying practices which are unfair to consumers:

To justify a finding of unfairness the injury must satisfy three tests. It must be substantial; it must not be outweighed by any countervailing benefits to consumers or competition that the practice produces; and it must be an injury that consumers themselves could not reasonably have avoided.

American Fin. Servs., 767 F.2d at 971. See Letter from Federal Trade Commission to Senators Ford and Danforth (Dec. 17, 1980), reprinted in H. R. REP. NO. 156, Pt. 1, 98th Cong., 1st Sess. 33-40 (1983), at 36. However, Illinois courts have adhered to the use of the S & H Criteria for interpreting the CFA ban against unfair acts or practices. See *supra* note 5, *infra* note 46.

²² *Scott*, 430 N.E.2d 1012.

²³ *Id.* at 1018 (quoting *Fitzgerald*, 380 N.E.2d at 794).

²⁴ *Id.* at 1018.

²⁵ *People ex rel. Fahner v. Walsh*, 461 N.E.2d 78, 81 (2nd Dist. 1984) (finding pyramid program in violation of the CFA); *Hedrich*, 438 N.E.2d at 928-29 (using S & H Criteria to find the owner of mobile home village in violation of the CFA); see generally *Testa*, 445 N.E.2d at 1252 (applying S & H Criteria in determination that owner/operator of mobile home lot violated Act by not permitting tenants to sell their homes unless the homes were removed from the lot after sale, thereby enabling defendant to buy certain homes at prices as much as 50% below those offered by other potential purchasers). But see *Kellerman v. Mar-Rue Realty & Builders, Inc.*, 476 N.E.2d 1259, 1263 (1st Dist. 1985) (finding that the CFA requires the existence of a misrepresentation or a deceptive omission of material fact with an intent that others rely upon such a misrepresentation or omission).

²⁶ Many pre-*Laughlin* cases obfuscated the theories on which liability was founded, often citing the S & H Criteria to determine that the defendants had engaged in "unfair or deceptive acts or practices." See, e.g., *Hedrich*, 438 N.E.2d at 928-29 (citing *Sperry* in determining whether a practice was "deceptive or unfair"); *Walsh*, 461 N.E.2d at 81-82 (applying S & H criteria to find that conduct violated the CFA because

defendant's pyramid scheme was "inherently deceptive"). Interestingly, many post-*Laughlin* decisions have maintained a more clear distinction. See *infra* note 46 and surrounding text.

²⁷ 550 N.E.2d 986 (Ill. 1990).

²⁸ *Id.*

²⁹ 740 ILL. COMP. STAT. 10/1-11 (West 1982).

³⁰ *Laughlin*, 550 N.E.2d at 987.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ The Antitrust Act provides in section 3 that:

Every person shall be deemed to have committed a violation of this Act who shall: (2) . . . by contract, combination, or conspiracy with one or more other persons unreasonably restrain trade or commerce

740 ILL. COMP. STAT. 10/3(2) (West 1982).

³⁵ *Laughlin*, 550 N.E.2d at 987.

³⁶ *Laughlin v. Evanston Hosp.*, 516 N.E.2d 468, 469 (1st Dist. 1987).

³⁷ *Id.* at 471.

³⁸ *Id.* at 470.

³⁹ *Id.*

⁴⁰ 15 U.S.C. §§ 1-7 (1988).

⁴¹ *Laughlin*, 550 N.E.2d at 990.

⁴² The court cited several federal decisions establishing that the Sherman Act does not proscribe price discrimination in and of itself. *Id.* at 989. Rather, the Sherman Act prohibits predatory price discrimination, which occurs when the seller offers a product or service below cost. *Id.* (citations omitted).

⁴³ *Id.* at 992.

⁴⁴ *Id.* The court further found the committee comments to the Antitrust Act to be in accord:

[I]t was not considered wise to incorporate all features of the comparable federal legislation. S.B. 116 is similar to the federal Sherman Act of 1890 . . . It was not deemed necessary or desirable to include measures comparable to the several substantive antitrust sections of the Clayton Act of 1914.

Id. at 991 (quoting Commentary on the 1967 Illinois Antitrust Act, Committee on Antitrust Law of the Chicago Bar Association at 441 (1967)).

⁴⁵ *Id.* at 993.

⁴⁶ *Id.*

⁴⁷ *Id.* at 995 (Clark, J., concurring). In his concurrence, Justice Clark disagreed with the majority's rationale that the CFA's prohibitions are limited to conduct that is either fraudulent or deceptive. He concluded that conduct can be "unfair" under the CFA even if it violates the Clayton Act. He concurred on

- the ground that the conduct did not violate the Clayton Act because the Clayton Act limited discriminatory pricing prohibitions in sections 2(a) and 2(c) to conduct affecting "commodities." *Id.*
- ⁴⁸ 558 N.E.2d 1312 (1st Dist. 1990).
- ⁴⁹ *Id.* at 1316. Interestingly, the court noted that the Second District blurred the distinction somewhat between unfair practices and deceptive practices by adopting the criteria to hold that the defendant's failure to disclose was an "unfair or deceptive practice." *Id.* (citing *Hedrick*, 438 N.E.2d at 928-29.) After finding that the defendant engaged in an unlawful unfair practice, the *Elder* court proceeded separately to determine that the defendant also violated the CFA by engaging in a deceptive practice. *Id.* at 1321-22.
- ⁵⁰ *People ex rel. Hartigan v. Knecht Servs., Inc.*, 575 N.E.2d 1378 (2nd Dist. 1991).
- ⁵¹ *Id.* at 1387.
- ⁵² *Id.* at 1385-87. The court engaged in a separate analysis applying different criteria to determine whether the defendant's conduct constituted a deceptive practice under the CFA. *Id.* at 1387.
- ⁵³ See *supra* note 9.
- ⁵⁴ *Saunders v. Michigan Ave. Nat'l Bank*, 662 N.E.2d 602 (1st Dist. 1996).
- ⁵⁵ *Id.* at 608.
- ⁵⁶ Additionally, at least one federal court interpreting Illinois law failed to address the existence of *Laughlin*. In *Elliott v. ITT Corp.*, 150 F.R.D. 569, 578 (N.D. Ill. 1992), the court quoted *Elder* and *Knecht* in recognizing that unfair conduct constitutes a violation of the CFA.
- ⁵⁷ *Sullivan's Wholesale Drug Co. v. Faryl's Pharmacy, Inc.*, 573 N.E.2d 1370 (5th Dist.), *cert. denied*, 580 N.E.2d 136 (1991).
- ⁵⁸ *Id.* at 1373.
- ⁵⁹ *Id.* at 1376 (quoting *Laughlin*, 550 N.E.2d at 993).
- ⁶⁰ See, e.g., *Gadson v. Newman*, 807 F. Supp. 1412, 1420 (C.D. Ill. 1992) (holding that under *Laughlin*, a cause of action under the CFA must involve conduct that either "defrauds" or "deceives" others); *Cf. Elliot*, 150 F.R.D. at 578 (citing with approval the use of the S & H Criteria in *Knecht*).
- ⁶¹ *Kedziora v. Citicorp Nat'l Servs., Inc.*, 780 F. Supp. 516 (N.D. Ill. 1991).
- ⁶² *Id.*
- ⁶³ *Id.* at 533-34 (citing *Sullivan*, 573 N.E.2d at 1376 n.1).
- ⁶⁴ The court noted that holding otherwise would conflict with the Antitrust Act's legislative intention regarding prohibitions against Robinson-Patman type activities. "[T]he legislature in the Antitrust Act declined to include provisions against price discrimination because the legislature found that inclusion of such prohibitions would be undesirable. To construe the CFA to give a cause of action for discriminatory pricing that the legislature refused to give under the Antitrust Act would be incongruous." *Laughlin*, 550 N.E.2d at 993.
- ⁶⁵ *Id.* at 987-990.
- ⁶⁶ 815 ILL. COMP. STAT. 505/2 (1984).
- ⁶⁷ See *Federal Trade Comm'n v. Indiana Fed'n of Dentists*, 476 U.S. 447, 454 (1986); *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 609 (1953).
- ⁶⁸ *Laughlin*, 550 N.E.2d at 993 (quoting *Historical and Statutory Notes* to 815 ILCS 505/1).
- ⁶⁹ *Id.*
- ⁷⁰ 815 ILL. COMP. STAT. 505/10(a) (West 1984).
- ⁷¹ *Scott*, 430 N.E.2d at 1018.
- ⁷² See *Fitzgerald*, 380 N.E. 2d at 793-94.
- ⁷³ The court also distinguished *Perrin*, *supra* note 5, on the same grounds. In *Laughlin*, the plaintiffs were competitors of the defendants, not third persons, and the contracts at issue were matters of public record. However, neither *Fitzgerald* nor *Perrin* relied on the fact that the complaints were made by third party consumers as opposed to competitors. Nor did these cases rely on any meaningful deception. Rather, both cases decided that a violation of the Clayton Act can be, but is not always, a violation of the CFA. See *Fitzgerald*, 380 N.E.2d at 793; *Perrin*, 404 N.E.2d at 513. Furthermore, privity between the plaintiff and the defendant is not required. *Elder*, 558 N.E.2d at 1312.
- ⁷⁴ *Fitzgerald*, 380 N.E.2d at 793 (citation omitted).
- ⁷⁵ *Id.* The plaintiffs, sellers and purchasers of real estate, had obtained preliminary reports of title and mortgage insurance policies from the defendant. The defendant submitted to the plaintiffs' financial institutions invoices reflecting "customary seller's charges" and "customary buyer's charges," but did not disclose that the defendant paid the financial institutions a ten percent rebate and/or discount with respect to these charges. *Id.* at 791-92.
- ⁷⁶ *Id.* at 793.

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