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Applicability of Illinois Consumer Fraud Act in Favor of Out-of-State Consumers

by DANIEL A. EDELMAN

XYZ Company, operating out of Chicago, runs commercials in a number of West Coast cities advertising a new and improved mousetrap for \$29.95, which consumers can order by using their credit cards and dialing an 800 number. Several thousand people call to purchase mousetraps, which, in turn, are mailed to the purchasers. None are sold locally. The mousetraps are defective and capable of gathering only dust, not mice.

Does the Illinois Consumer Fraud Act¹ ("the Illinois Act") apply to the actions of XYZ Company? The question is likely to arise in two contexts:

1. The Attorney General of Illinois files suit under the Illinois Act to enjoin XYZ Company from selling its product.

2. A class action is filed seeking a refund on behalf of all purchasers of XYZ Company's product. The plaintiff seeks to apply the Illinois Act to the entire class in an effort to apply a single body of law to the entire class

and establish that all legal questions are common to the entire class.²

This article addresses what are commonly mislabelled "conflict of laws" or "choice of law" issues in the application of state consumer protection and investor protection³ laws. The issue is *not* one of "conflict of laws" or "choice of law" in the conventional sense. Both the state where the harmful conduct occurred and the state where the victim was injured can apply their statutes to interstate consumer and investor frauds. A "conflict of laws" is presented, or a "choice of law" issue arises, only when it is impossible to comply with the law of both states.

This principle has long been applied in the criminal context. The premise of this article is that the choice of law rules applicable in a multistate consumer fraud or investment fraud

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Mr. Edelman, with co-author O. Randolph Bragg, wrote about the Fair Debt Collection Practices Act in the Loyola Consumer Law Reporter, Volume 7, number 3.

case are no different than those applicable to the classic case of a defendant who, while standing in state A, fires a rifle across the state line, killing someone in state B. The malefactor has violated the murder statutes of *both* states and can be prosecuted by either state. Of course, the plaintiff can recover the same element of damages but once.

This article was prompted by recent federal decisions at the district court level questioning the applicability of the Illinois Act to an Illinois business that acts inappropriately while in Illinois and, while doing so, injures out-of-state consumers.⁴ Not only does precedent support the application of the Illinois statute in such circumstances, but there are compelling policy reasons for so applying it.

ILLINOIS DECISIONS

The Illinois Supreme Court addressed this issue in *Martin v. Heinold Commodities*.⁵ In *Martin*, an Oklahoma resident brought a national class action suit against an Illinois business, alleging breach of fiduciary duty and violation of the Illinois Act.⁶ The complaint alleged that the defendant engaged in unfair and deceptive practices in connection with futures transactions. The court held that Illinois law (both the Illinois Act and the Illinois law of fiduciary responsibility) would be applied to all members of the class, regardless of where the plaintiffs resided, because Illinois had a substantial interest in seeing that companies headquartered in the state of Illinois acted properly:

[W]e conclude that the substantive law of Illinois can be applied to resolve the factual issue common to the class.

The Supreme Court

recently addressed the question of which State's substantive law governs resolution of common factual issues presented in a multistate class-action litigation. The Court held that the substantive law of the forum State could be applied, consistent with the requirements of procedural due process, where the forum State has "'significant contact or aggregation of contacts' to the claims asserted by each member of the plaintiff class, contacts 'creating state interests' . . . ensur[ing] that the choice of [its] law is not arbitrary or unfair."⁷

Applying the Phillips Petroleum standard to the instant case, it is apparent that Illinois substantive law can be applied to resolve the underlying common factual dispute. Here each member of the plaintiff class asserts the same breach of defendant's fiduciary duty with regard to the same non-disclosure of the same fact. This common allegation implicates the legitimate interests of the State of Illinois in insuring that persons and entities within its jurisdiction, insofar as they undertake to act as agents, do so in accordance with its law. In this connection, we observe that defendant's principal place of business is Illinois and that this fact was made manifest to each member of the plaintiff class . . . On these facts, there can be no doubt that the claim of each member of the plaintiff class implicates the legitimate interests of Illinois in applying its law to adjudicate a dispute involving a

business principally situated in its jurisdiction and which, by its own efforts, insistently has sought to avail itself of both the courts and the laws of the forum State.⁸

DECISIONS ELSEWHERE

Other courts have recognized the same principle. In *Kugler v. Haitian Tours, Inc.*,⁹ one of the earliest decisions addressing the territorial scope of consumer protection laws, a New Jersey court held that the state's Consumer Fraud Act applied to unfair and deceptive practices perpetrated by a New Jersey business against out-of-state consumers. The defendants in that case, who operated from New Jersey, promoted a "Haitian travel package" for persons interested in quick divorces. The "travel package" included a Haitian divorce decree. Defendants failed to disclose the material fact that Haitian divorce decrees were not recognized in the United States.¹⁰

The court held that the defendants' failure to disclose this fact was deceptive and enjoined them from selling their "travel package" in the future.¹¹ Rejecting the defendants' plea that the injunction should be limited to sales efforts directed at New Jersey residents, the court held:

[The] defendants have been guilty of unlawful practices proscribed by the Consumer Fraud Act. That Act is not confined by its terms or spirit to activities involving residents of this State. As I read the Act, it prohibits unlawful practices in New Jersey without limitation as to the place of residence of the persons imposed upon.

Under all of the circumstances, I feel constrained to enjoin defendants permanently from all sales of the Haitian divorce package in New Jersey.¹²

Similarly, a California court held that California law could be applied to fraudulent practices carried out from California against consumers in all states. In *Clothesrigger, Inc. v. GTE Corp.*,¹³ the California Appellate Court set aside a trial court order denying certification of a multistate class, directing the trial court to first determine whether California law could be applied to the entire class because the defendant was based in California. The appellate court held that California had an interest in "applying its law to punish and deter the alleged wrongful conduct" if the defendant engaged in the wrongful conduct in California.¹⁴ As in *Martin*, the court was willing to apply California common law as well as its consumer protection statutes to protect out-of-state residents.¹⁵

The same principle has been applied by courts in Alabama,¹⁶ Arizona,¹⁷ Colorado,¹⁸ Connecticut,¹⁹ Florida,²⁰ Indiana,²¹ Maryland,²² Massachusetts,²³ Missouri,²⁴ New Hampshire,²⁵ New York,²⁶ North Carolina,²⁷ Ohio,²⁸ South Carolina,²⁹ Texas,³⁰ Utah,³¹ and Virginia.³² This principle has been described as "the weight of authority."³³

REJECTION OF "CHOICE OF LAW" ANALYSIS

Rejection of the notion that the potential applicability of multiple state consumer protection or investor protection laws requires a "choice of law" is essential to the analysis proposed in this article. Rather, the only issue is whether the Illinois Act should be applied to a particular trans-

action; the fact that another state's consumer protection statute applies as well is not relevant. As explained in *Barnebey v. E. F. Hutton & Co.*,³⁴ in the context of investor protection or "Blue Sky" laws, a conflict of laws question does not necessarily arise when state securities laws overlap:

Many if not all such laws are written to protect purchasers of securities, regardless of the security's origin. Such statutes also seek to render liability on securities issuers whose activities within a given state fail to conform to that state's laws. . . . When a securities transaction

crosses state lines and the plaintiffs sue under a Blue Sky law (as in this case), more than one state's Blue Sky law may apply. In

such situation, the issue is not (as defendants would urge) "of the states whose law might apply, which state law will a conflicts analysis indicate is the 'better' choice of law." Rather, the issue is whether the plaintiffs' allegations show a sufficient nexus between the parties and the particular state law pleaded to justify applying that law.³⁵

The key is to analyze the issue as one of *legislative intent* rather than one of "choice of law" or "conflict of laws" in the conventional sense. Where a statute prescribes its territorial applicability, common law decisions outlining choice of law principles do not apply, and the

statutes on which the plaintiff relies must be examined to determine whether they apply to the transaction at issue. "[A] court should only resort to [common law] guidelines in the absence of either a valid contractual agreement between the parties regarding the applicable law, or a local statutory provision controlling the disposition of the choice of law question."³⁶ As stated in section 6 of the *Restatement (Second) of Conflict of Laws*: "[a] court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law."³⁷ Thus, the issues are whether the transaction at hand is within

the intended scope of the statute invoked by the plaintiff and whether the jurisdiction that enacted the statute had constitutional authority to apply it in that manner.³⁸

The intended geographical scope of a statute may be express or implied. As the *Restatement (Second) of Conflict of Laws* states:

b. Intended range of application of statute. A court will rarely find that a question of choice of law is explicitly covered by statute. That is to say, a court will rarely be directed by statute to apply the local law of one state, rather than the local law of another state, in the decision of a particular issue. On the other hand, the court will constantly be faced with the question whether the issue before it falls within the intended range of application of a particular statute. *The court should give a local statute the range of appli-*

Many if not all such laws are written to protect purchasers of securities, regardless of the security's origin.

cation intended by the legislature when these intentions can be ascertained and can constitutionally be given effect. If the legislature intended that the statute should be applied to the out-of-state facts involved, the court should so apply it unless constitutional considerations forbid. (Emphasis added.)³⁹

In determining whether a statute that is silent or ambiguous as to its territorial applicability should be applied to multistate transactions, the court must examine the statute's purpose, content, and legislative history as well as its express language.⁴⁰ If this analysis indicates its applicable territorial scope, then no further choice of law analysis is needed.⁴¹

In the case of the Illinois Act, the courts have repeatedly interpreted the legislative history to indicate that the Illinois legislature intended the Illinois courts to follow the Illinois Act closely when rectifying deceptive and unfair business practices.⁴² The language of section 1(f) of the Illinois Act has been characterized by courts as expansive in nature, rather than restrictive.⁴³ Moreover, courts have emphasized that the language is "to be given a liberal construction so that the broad purposes of the Consumer Fraud Act might be achieved."⁴⁴ In the absence of specific limiting language, which does not exist in the Illinois Act,⁴⁵ this expansive policy should be applied to the jurisdictional scope of the statute as well as its substantive prohibitions.

In addition, the General Assembly has amended the Illinois Act on a number of occasions since the 1987 decision in *Martin*.⁴⁶ At no time has it sought to limit the determination in *Martin* that the Illinois Act applies in favor of

non-Illinois residents injured by an Illinois business. In essence, this lack of limitation amounts to legislative approval of the *Martin* holding.⁴⁷

CONSTITUTIONAL LIMITATIONS

The Due Process and Full Faith and Credit Clauses limit the ability of a state to apply its law to a controversy⁴⁸. A state can apply its own law if it has "a significant contact" or "significant aggregation of contacts," which create state interests, such that a choice of its law is neither "arbitrary" nor "fundamentally unfair."⁴⁹ The Full Faith and Credit Clause does not require a state to subordinate its public policy to the laws of another state where enforcement of the other state's laws would be contrary to the public policy of the first state.⁵⁰

The right of Illinois to prohibit a person located within its territorial jurisdiction from engaging in unfair or deceptive acts and practices, irrespective of where the victim is located, appears undeniable. Any state has a reasonable, legitimate interest in preventing fraudulent activities from taking place within its borders.⁵¹ and in applying legal sanctions to achieve this objective. The United States Supreme Court dismissed, for want of a substantial federal question, an appeal from a judgment based on the application of the Texas securities laws against a Texas company that sold *only* to out-of-state investors.⁵² Accordingly, there appears to be no constitutional barrier to holding that the Illinois Act applies in favor of a consumer injured by the conduct of a person or company present within the territorial jurisdiction of Illinois, irrespective of where the victim might be located.

As noted at the outset of this article, this

is not to say that the statute of the state where the consumer was injured *also* does not apply. Instead, in these situations, the consumer has a remedy under Illinois law, even though he also may seek recourse under the law of a different state that has contacts with the transaction.

POLICY CONSIDERATIONS

There are compelling policy considerations in favor of the rule proposed in this article. As a practical matter, state Attorneys General, or other officials charged with the enforcement of consumer protection and investor protection statutes, normally are authorized to enforce only the statutes of their own states.⁵³

Consequently, in an era of widespread interstate mail and telemarketing fraud, it is essential that the Attorney General of Illinois have the right to prosecute violators located within the territorial jurisdiction of the state, even if all of the victims are located elsewhere. State officials also should have the ability to protect residents of the state against malefactors located elsewhere.

Thus, in the hypothetical regarding XYZ Company, the Illinois Attorney General should be able to proceed against this company under the Illinois Act. The Attorney General is not authorized to enforce the consumer protection laws of any other state. Furthermore, the fact that a company located in Illinois engaged in deceptive sales practices should be of concern to law enforcement authorities in Illinois, even if all the victims are located elsewhere.

Similarly, a victim of XYZ Company's deceptive practices, who is domiciled in another state, should be able to bring a class action suit against XYZ Company under the Illinois Act. Moreover, the victim could sue on behalf of all victims of the deceptive sales practices, regardless of where each victim is domiciled.

ORIGIN AND FAULTS OF CONTRARY POSITION

*Seaboard Seed Co. v. Bemis*⁵⁴ contains language that appears to be contrary to the applicability of the Illinois Act.

Careful reading of the opinion, however, discloses that the plaintiff did not allege that the practices at issue were *either* conducted in Illinois

There are compelling policy considerations in favor of the rule proposed in this article.

or directed at persons within Illinois.⁵⁵ In addition, *Seaboard* has been distinguished by the Seventh Circuit.⁵⁶ According to these opinions, the Illinois Act only applies in favor of Illinois consumers and, as such, should not be applied to cases in which only the conduct complained of occurred in Illinois. Most of the courts citing *Seaboard* for this proposition simply ignore the Illinois Supreme Court's decision in *Martin*.⁵⁷

Apart from the dubious precedential value of a decision flatly contrary to the Illinois Supreme Court's ruling on the same issue,⁵⁸ the analysis in *Seaboard* is incorrect. The *Seaboard* court relied on a subtle misreading of section 1(f) of the Illinois Act, which makes the Illinois Act applicable to "any trade or commerce directly or indirectly affecting the people of this State."⁵⁹ *Seaboard* construed section 1(f) as if it provided

that the Illinois Act applied to any trade or commerce directly or indirectly affecting persons *within* this State.⁶⁰ In fact, the language of section 1(f) denotes that the Illinois Act is intended to apply to any trade or commerce that Illinois has the constitutional authority to regulate.

Historically, the phrase “the people of this State,” which is part of the language of the Illinois Act,⁶¹ has referred to the body politic or sovereignty of the state of Illinois, not to “residents of the State” in general or to a particular person within the state. This phrase is common in Illinois jurisprudence; all criminal cases in Illinois are captioned “The People of the State of Illinois v. _____.” If the language of section 1(f) is read in this manner, it clearly does not require that the victim be an Illinois resident. It does, however, suggest that the connection to the state of Illinois required under the Illinois Act is the same as that required for the application of the Illinois Criminal Code.⁶² Thus, the reference in section 1(f) of the Illinois Act is *not* to violations against Illinois residents, but to violations that offend the “peace and dignity” of the State of Illinois.

Conducting deceptive business practices from a location within the territorial jurisdiction of the state of Illinois is an affront to “the People of the State of Illinois.” Indeed, as the New York Supreme Court held: “[A] state is damaged if its citizens are permitted to engage in fraudulent practices even though those parties damaged are nonresidents of the State.”⁶³ In addition, laws prohibiting “unfair and deceptive acts and practices,” such as the Illinois Act, protect not only consumers, but also businesses. Allowing an Illinois business to engage in unfair, deceptive practices, against *anyone*, puts Illinois businesses that do *not* break the law at a competitive disad-

vantage.⁶⁴

THE PARTIES SHOULD NOT BE ABLE TO AFFECT THESE RULES BY CONTRACT

The foregoing discussion compared the jurisdictional reach of the Illinois Act to that of the criminal statutes of the state. It follows that consumers cannot alter the applicability of the Illinois Act by contract any more than they could, by contract, waive the protections of the Illinois Criminal Code. If the statute serves a public purpose, the public purpose cannot be defeated by a form contract term imposed by the violator.

The Eighth Circuit and Missouri Supreme Court reached this conclusion with respect to the Missouri consumer protection statute in *Electrical & Magneto Serv. Co. v. AMBAC Int'l Corp.*⁶⁵ 941 F.2d 660 (8th Cir. 1991); 823 S.W.2d 493, 498 (Mo. banc 1992).⁶⁶ and *High Life Sales Co. v. Brown-Forman Corp.*⁶⁷ In *AMBAC Int'l Corp.*, the court concluded:

Having enacted paternalistic legislation designed to protect those that could not otherwise protect themselves, the Missouri legislature would not want the protections of Chapter 407 [the Missouri consumer protection statute] to be waived by those deemed in need of protection. Furthermore, the very fact that this legislation is paternalistic in nature indicates that it is fundamental policy: ‘a fundamental policy may be embodied in a statute which .. is designed to protect a person against the oppressive use of superior bargaining power.’”⁶⁸

The court concluded: “[t]he Missouri

statutes in question, relating to merchandising and trade practices, are obviously a declaration of state policy and are matters of Missouri's substantive law. To allow these laws to be ignored by waiver or by contract, adhesive or otherwise, renders the statutes useless and meaningless."⁶⁹

Other courts have likewise held that a choice of law provision in a contract cannot abrogate the rights of a party protected by statute to invoke that protection or the right of the public to demand that state officials apply statutes in accord with legislative intent.⁷⁰

Illinois courts have heretofore allowed displacement of the Illinois Act by contractual choice of law clauses.⁷¹ As the analysis set forth in this article suggests, a contrary ap-

proach should be followed in such cases.

CONCLUSION

The applicability of the Illinois Act to transactions in which an Illinois business injures consumers located in other states should not be analyzed according to conventional "conflict of laws" or "choice of law" rules. The legislature intended the Illinois Act to apply to cases of this type and the Illinois Supreme Court has construed the Act to apply to any transactions that affect the interests of the State of Illinois, directly or indirectly. The fact that prohibited conduct takes place within the boundaries of the State of Illinois establishes that the state officials have an interest in regulating such conduct, irre-

spective of where the victims are located. The territorial scope of the Illinois Act is, thus, similar to that of the Illinois Criminal Code.

Private parties cannot affect the applicability of the Illinois Act through contractual choice of law clauses. The interest of the State of Illinois in regulating conduct that occurs within its borders, or otherwise affects its interests, cannot be diminished by the agreement of the particular parties involved. Thus, state officials should be able to apply the Illinois Act just as they apply the Illinois Criminal Code, without first considering any contract that exists to the contrary. Likewise, the rights of private litigants under the Illinois Act should not be affected by choice of law clauses.

E N D N O T E S

¹ ILL. COMP. STAT. ch. 815 § 505/1 (West 1993).

² See *Hickey v. Great W. Mortgage Corp.*, 158 F.R.D. 603 (N.D. Ill. 1994); *South Carolina Nat'l Bank v. Stone*, 139 F.R.D. 325 (D.S.C. 1991). A number of courts have declined to certify multistate classes based on state law claims because they felt they could not apply a single body of law to the entire class. See, e.g., *South Carolina Nat'l Bank*; 139 F.R.D. 325; *Endo v. Albertine*, No. 88 C 1815, 1995 U.S.

Dist. LEXIS 4517 (N.D. Ill. April 7, 1995) (decertifying a class in the erroneous belief that the Illinois Act does not apply where a defendant located in Illinois allegedly defrauds investors located elsewhere). *Contra Skelton v. General Motors Corp.*, 1985-2 Trade Cas. (CCH) ¶66,683 (N.D. Ill. 1985); *Miner v. Gillette Co.*, 428 N.E.2d 478 (Ill. 1981). However, the ability to apply the law of a single state to the entire class materially simplifies the action.

³ State investor protection laws are commonly known as "Blue Sky" laws, as they are intended to prevent the sale of "a piece of blue sky."

⁴ *Endo*, 1995 U.S. Dist. LEXIS 4517 at *18-9; *Singletary v. Continental Ill. Nat'l Bank*, No. 89 C 2821, 1993 U.S. Dist. LEXIS 3189 (N.D. Ill. March 12, 1993) *aff'd on other grounds*, 9 F.3d 1236 (7th Cir. 1993) (the Court of Appeals expressly refrained from passing on this issue); *Continental X-Ray Corp. v. XRE Corp.*, No. 93 C 3522, 1995

- U.S. Dist. LEXIS 14722 (N.D. Ill. October 2, 1995); Swartz v. Schaub, 818 F. Supp. 1214 (N.D. Ill. 1993); Bettarini v. Citicorp Services, Inc., No. 91 C 8390, 1992 U.S. Dist. LEXIS 43 (N.D. Ill. January 7, 1992), all relying on Seaboard Seed Co. v. Bemis, 632 F. Supp. 1133, 1140 (N.D. Ill. 1986).
- ⁵ Martin v. Heinold Commodities, 510 N.E.2d 840 (Ill. 1987).
- ⁶ *Id.* at 841.
- ⁷ *Id.* at 847 (quoting Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 822 (1985)).
- ⁸ *Id.* In a subsequent decision of the appellate court, the Illinois Appellate Court held that Illinois law applied to a multistate class of purchasers of adulterated orange juice that was formulated in, and marketed from, Illinois. Gordon v. Boden, 586 N.E.2d 461 (Ill. App. Ct. 1991), *appeal denied*, 591 N.E.2d 21 (Ill. 1992), *cert. denied*, Bodine's, Inc. v. Gordon, 113 S.Ct. 303 (1992). Most recent decisions of the federal courts applying Illinois law are in accord. Fry v. UAL Corp., 136 F.R.D. 626, 637 (N.D. Ill. 1991); Israel Travel Advisory Serv., Inc. v. Israel Identity Tours, Inc., No. 92 C 2379, 1993 WL 239051, at *7 (N.D. Ill. June 24, 1993) (the basic test of applicability of the Illinois statute: whether there was "conduct committed in Illinois or directed at Illinois residents"); Cirone-Shadow v. Union Nissan, No. 94 C 6723, 1995 WL 238680 (N.D. Ill. Apr. 19, 1995) (applying the Illinois Act in favor of a Wisconsin resident who purchased a car from an Illinois dealership located just across the state line); Hickey, 158 F.R.D. 603 at 613 ("Hickey presents Illinois authority stating . . . that the consumer protection laws of a state where a creditor is located and formulated the tortious procedures may govern a deceptive acts and practices suit filed by a class of out-of-state plaintiffs."); VPHI, Inc. v. Nat'l Educ. Training Group, Inc., No. 94 C 5559, 1995 U.S. Dist. LEXIS 1365 (N.D. Ill. January 20, 1995) (noting that the Consumer Fraud Act applies if conduct occurs in Illinois or if Illinois consumers are affected).
- ⁹ Kugler v. Haitian Tours, Inc., 293 A.2d 706 (N.J. Super. App. Div. 1972).
- ¹⁰ *Id.* at 708.
- ¹¹ *Id.* at 711.
- ¹² *Id.* at 711. *Accord*, Zinberg v. Washington Bancorp, Inc., 138 F.R.D. 397 (D.N.J. 1990).
- ¹³ Clothesrigger, Inc. v. GTE Corp., 236 Cal. Rptr. 605 (Cal. App. Ct. 1987).
- ¹⁴ *Id.* at 609.
- ¹⁵ *Accord*, In re Computer Memories Securities Litigation, 111 F.R.D. 675, 686 (N.D. Cal. 1986) (California law could be applied to entire class in nationwide securities fraud case where the defendant was a California corporation, the acts complained of emanated from California, and the money collected went to California); In re Pizza Time Theater Securities Litigation, 112 F.R.D. 15 (N.D. Cal. 1986); Dillon Securities, Inc. v. Bartolini, 944 F.2d 911 (10th Cir. 1991) (California "Blue Sky" law applied to sale made from California into Utah).
- ¹⁶ Upton v. Trinidad Petroleum Corp., 468 F. Supp. 330 (N.D. Ala. 1979) (securities).
- ¹⁷ State ex rel. Corbin v. Pickrell, 667 P.2d 1304 (Ariz. 1983) (Arizona consumer fraud, securities and racketeering laws could be applied to conduct by local business against out-of-state residents); In re American Continental Corp./Lincoln S. & L. Ass'n Securities Litig., 794 F. Supp. 1424 (D. Ariz. 1992) (securities laws).
- ¹⁸ Rosenthal v. Dean Witter Reynolds, Inc., 1995 LEXIS 763 (Colo. Sup. Ct., December 18, 1995) (securities laws).
- ¹⁹ In re DeFelice, 77 B.R. 376, 380 (Bankr. D. Conn. 1987) (Attorney General of New York could bring action on behalf of residents of other states against New York consumer fraud violator because "New York's quasi-sovereign interest is served whenever the perpetrators of consumer fraud within its borders are brought to justice, regardless of whether their victims happen to be citizens"); In re Boardwalk Marketplace Securities Litigation, 122 F.R.D. 4 (D. Conn. 1988) (applying Connecticut law to pendent state claims in securities fraud case, where company that perpetrated alleged fraud was located in Connecticut and fraud was allegedly perpetrated from Connecticut).
- ²⁰ Barnebey v. E.F. Hutton & Co., 715 F. Supp. 1512 (M.D. Fla. 1989) (securities laws).
- ²¹ Klawans v. E. F. Hutton & Co., IP 83 680 C, 1989 U.S. Dist. LEXIS 18194 (S.D. Ind., February 15, 1989) (court applied Oklahoma securities laws to sale made from that state into Indiana).
- ²² In re Kirschner Medical Corp. Securities Litigation, 139 F.R.D. 74 (D. Md. 1991) (pendent state claims in securities fraud case).
- ²³ Randle v. SpecTran, 129 F.R.D. 386 (D. Mass. 1988) (pendent state claims in securities case).
- ²⁴ In re Marion Merrell Dow Inc. Securities Litigation, 1994 Fed. Sec. L. Rptr. (CCH) ¶98,356 (W.D. Mo. 1994) (pendent state claims in securities fraud case). In addition, the Missouri consumer protection statute expressly covers acts and practices carried out "from" Missouri. MO. REV. STAT., § 407.020, subdivision 1 (1996).
- ²⁵ Baum v. Centronics Data Computer Corp., 1986 Fed. Sec. L. Rptr. (CCH) ¶92,797 (D.N.H. 1986) (pendent state claims in securities fraud case).
- ²⁶ People v. Camera Warehouse, Inc., 496 N.Y.S.2d 659, 660 (1985) (state could bring a consumer fraud action on behalf of nonresidents against a fraudulent New York mail order operation because "[a] state is damaged if its citizens are permitted to engage in fraudulent practices even though those parties damaged are nonresidents of the state"); In re Energy Systems Equipment Leasing Securities Litigation, 642 F. Supp. 718 (E.D.N.Y. 1986) (New York law could be applied to pendent state claims in securities fraud case where fraud was allegedly carried out from New York); Chrysler Capital Corp. v. Century Power Corp., No. 91 CIV. 1937(RPP), 1992 U.S. DIST. LEXIS 9187 at *5 (S.D.N.Y. June 23, 1992) (recognizing that another court held "because more than one state can have an interest in regulating a single securities transaction, overlapping state securities laws do not present a classic conflict of laws question;" court applied the Arizona, Connecticut, Iowa and Oregon securities laws).
- ²⁷ Simms Investment Co. v. E. F. Hutton & Co., 699 F. Supp. 543 (M.D.N.C. 1988) (state securities laws).
- ²⁸ Brown v. Market Development, Inc., 322 N.E.2d 367, 369 (Ohio Ct. Com. Pls. 1974) (Ohio consumer fraud statute "is intended to prohibit [and to provide civil remedies to enforce the prohibi-

- tion of] deceptive and unconscionable acts and practices by Ohio suppliers in connection with consumer transactions, irrespective of the location of the consumer, whether within or without Ohio").
- ²⁹ *South Carolina Nat'l Bank*, 139 F.R.D. 325 at 334 (pendent state claims in securities fraud case, including South Carolina Securities Act).
- ³⁰ *Rio Grande Oil Co. v. State*, 539 S.W.2d 917 (Tex. Civ. App. 1976) (securities); *Enntex Oil & Gas Co. v. State*, 560 S.W.2d 494 (Tex. Civ. App. 1977), *appeal dismissed* 439 U.S. 961 (1978) (securities).
- ³¹ *Johnson-Bowles Co. v. Division of Securities*, 829 P.2d 101 (Utah App. 1992) (securities laws).
- ³² *Lintz v. Carey Manor Ltd.*, 613 F. Supp. 543, 551 (W.D. Va. 1985) (securities laws).
- ³³ *Chrysler Capital Corp.*, No. 91 CIV. 1937(RPP), 1992 U.S. DIST. LEXIS 9187 at *5 (S.D.N.Y. June 23, 1992). A contrary decision from Delaware acknowledged the general rule, but concluded that the language of the Delaware general consumer protection statute required a more limited application. *Goodrich v. E. F. Hutton Group*, 542 A.2d 1200 (Del. Ch. 1988). On the other hand, in *Johnson v. Ronamy Consumer Credit Corp.*, 515 A.2d 682, 688 (Del. 1986), the Delaware Supreme Court held that a Delaware secondary mortgage statute applied to all loans secured by Delaware real estate or on which a resident of the state was obligated, on the ground that the intended scope of the statute was to protect Delaware residents and real estate from "predatory secondary mortgage loan practices."
- ³⁴ *Barnebey*, 715 F. Supp. 1512.
- ³⁵ *Id.* at 1535. *Accord*, *Simms Investment Co.*, 699 F. Supp. at 545-46; *Chrysler Capital Corp.*, 1992 U.S. DIST. LEXIS 9187, at *5; *Lintz*, 613 F. Supp. at 551.
- ³⁶ *Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan*, 883 F.2d 345, 353 (5th Cir. 1989) (quoting *American Home Assurance Co. v. Safeway Steel Prod. Co., Inc.*, 734 S.W.2d 693, 697 (Tex. Ct. App. 1987)). *Accord*, *Barclays Discount Bank Ltd. v. Levy*, 743 F.2d 722, 725 (9th Cir. 1984); *McNall v. Tatham*, 676 F. Supp. 987 (C.D. Cal. 1987); *Gulf Ins. Co. v. Davis*, 65 F.3d 166 (4th Cir. 1995) (Virginia statute relating to uninsured motorist coverage prescribed, which policies it applied to, and displaced normal choice of law principle, under which law of insured's domicile governs policy).
- ³⁷ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971).
- ³⁸ *Sommers*, 883 F.2d 345 at 353; *Barclays*, 743 F.2d 722 at 725; *McNall*, 676 F. Supp. 987 at 996 n. 12; *Johnson*, 515 A.2d 682 at 688.
- ³⁹ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 cmt. b (1971).
- ⁴⁰ *Oxford Consumer Discount Co. v. Stefanelli*, 246 A.2d 460 (N.J. Super. Ct. App. Div. 1968), *supplemental op.*, 250 A.2d 593 (N.J. Super. Ct. App. Div. 1968), *aff'd*, 262 A.2d 874 (N.J. 1970), *appeal dismissed sub. nom.* *First Mercantile Consumer Discount Co. v. Stefanelli*, 400 U.S. 808 (1970) (the court held that a New Jersey secondary mortgage statute applied to any loan made to a New Jersey resident and secured by New Jersey residential real estate, even if the loan was signed elsewhere, because the enactment of the statute had been preceded by complaints about New Jersey residents traveling to Philadelphia to obtain real estate loans on harsh terms).
- ⁴¹ 73 AM. JUR. 2D, *Statutes*, §359 (1974).
- ⁴² *Carter v. Mueller*, 457 N.E.2d 1335, 1341 (Ill. App. Ct. 1983); *Buzzard v. Bolger*, 893, 453 N.E.2d 1129, 1132 (Ill. App. Ct. 1983); *People ex rel. Hartigan v. MacLean Hunter Pub. Corp.*, 457 N.E.2d 480, 485 (Ill. App. Ct. 1983); *Warren v. LeMay*, 491 N.E.2d 464, 471 (Ill. App. Ct. 1986); *American Buyers Club of Mt. Vernon, Ill., Inc. v. Hayes*, 361 N.E.2d 1383, 1384 (Ill. App. Ct. 1977); *American Buyers Club of Mt. Vernon, Illinois, Inc. v. Honecker*, 361 N.E.2d 1370, 1373-74 (Ill. App. Ct. 1977); *Duhl v. Nash Realty, Inc.*, 429 N.E.2d 1267 (Ill. App. Ct. 1981).
- ⁴³ *Scott v. Ass'n of Childbirth at Home, Int'l*, 430 N.E.2d 1012 (Ill. 1981).
- ⁴⁴ *People ex rel. Daley v. Datacom Systems Corp.*, 531 N.E.2d 839, 845 (Ill. App. Ct. 1988), *aff'd*, 585 N.E.2d 51 (1991).
- ⁴⁵ ILL. COMP. STAT. ch. 815 § 505/1 (West 1993).
- ⁴⁶ *Martin*, 510 N.E.2d 840.
- ⁴⁷ *Jackson v. Resolution GGF Oy*, No. 94 C 255, 1995 U.S. Dist. LEXIS 13717 (N.D. Ill. September 5, 1995).
- ⁴⁸ U.S. CONST. amend. XIV, § 2. U.S. CONST. art. IV, § 1.
- ⁴⁹ *Phillips*, 472 U.S. 797 (1985). *See also* *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981).
- ⁵⁰ *Rigney v. Edgar*, 482 N.E.2d 367 (Ill. App. Ct. 1985).
- ⁵¹ *Upton*, 468 F. Supp. at 335.
- ⁵² *Enntex*, 560 S.W.2d 49.
- ⁵³ The Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. § 6101 (1995) allows the Attorney General of any state to bring a civil action in federal district court when that state's residents are being harmed "because any person has engaged or is engaging in a pattern or practice of telemarketing which violates any rule of the [Federal Trade] Commission." The state official can obtain injunctive relief, damages, restitution or other compensation. 15 U.S.C. § 6103(a) (1995). Nationwide service of process is authorized. 15 U.S.C. § 6103(e)(1995). However, the statute is limited to telemarketing abuse, does not include deceptive use of the mail, and does not solve the practical problem of enforcing a judgment against a defendant who has no assets within the jurisdiction in which the suit is pending.
- ⁵⁴ *Seaboard*, 632 F. Supp. at 1140.
- ⁵⁵ In *Seaboard*, a manufacturer of grass seed charged a packaging manufacturer with violating the Illinois Act. 632 F. Supp. at 1140. The packages had been manufactured in Indiana, sold to a customer in Oregon, and used to ship grass seed to stores in Michigan, Ohio and Kentucky. There was, in short, no nexus with Illinois of any sort.
- ⁵⁶ For example, in *Swartz*, 818 F. Supp. 1214, a resident of the state of Washington brought suit against several Illinois residents for actions arising from plaintiff's purchase of an expensive automobile. Judge Shadur, who had written the *Seaboard* opinion, dismissed the Illinois Act claim on the theory that the statute could not be invoked by a non-resident of Illinois. Similarly, in *Singletary v. Continental*

Ill. Nat'l Bank, No. 89 C 2821, 1993 U.S. Dist. LEXIS 3189 (N.D. Ill. March 12, 1993) *aff'd on other grounds*, 9 F.3d 1236 (7th Cir. 1993), an out-of-state investor was complaining about conduct that took place in Illinois. *See also supra* notes 2, 4.

⁵⁷ *Martin*, 510 N.E.2d 840.

⁵⁸ Federal district courts applying state law simply prognosticate what the reviewing courts of the state would hold. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). Once the Supreme Court of Illinois has held that the Illinois Act protects consumers in other states, an earlier contrary statement by a district court has no precedential value.

⁵⁹ ILL. COMP. STAT. ch. 815 § 505/1(f) (West 1993). Section 1(f) of the Illinois Act states:

The terms "trade" and "commerce" mean the advertising, offering for sale, sale, or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value wherever situated, and shall include any trade or commerce directly or indirectly affecting the people of this State.

⁶⁰ *Seaboard*, 632 F. Supp. 1132 at 1139-40.

⁶¹ ILL. COMP. STAT. ch. 815 § 505/1(f) (West 1993).

⁶² The Criminal Code of Illinois provides that it covers any offense committed in whole or in part within the state, either directly or through any person for whose conduct the defendant is legally accountable. ILL. COMP. STAT. ch. 720 § 5/1-5(a)(1) (West 1993). An offense is committed partly within Illinois if either the proscribed conduct or the proscribed result occurs in Illinois. ILL. COMP. STAT. ch. 720 § 5/1-5(b) (West 1993). The Criminal Code also covers an agreement within Illinois to com-

mit, in another state, conduct which is an offense in both states. ILL. COMP. STAT. ch. 720 § 5/1-5(a)(3) (West 1993).

⁶³ *Camera Warehouse*, 496 N.Y.S.2d 659 at 660.

⁶⁴ *Barnebey*, 715 F. Supp. 1512 at 1533-36.

⁶⁵ *Electrical & Magneto Serv. Co. v. AMBAC Int'l Corp.*

⁶⁶ 941 F.2d 660 (8th Cir. 1991).

⁶⁷ *High Life Sales Co. v. Brown-Forman Corp.* 823 S.W.2d 493, 498 (Mo. banc 1992).

⁶⁸ *AMBAC*, 941 F.2d 660 at 664 (quoting the RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 187, cmt. g (1971)).

⁶⁹ *Id.* at 663-4. In *High Life*, the Missouri Supreme Court quoted this passage at length, adopted the reasoning of *AMBAC* and held that even a business could not waive the protections of Chapter 407. 823 S.W.2d 493 at 498.

⁷⁰ *Dominion Indus., Inc. v. Overhead Door Corp.*, 762 F. Supp. 126 (W.D.N.C. 1991) (Texas choice of law provision did not preclude claim under the North Carolina unfair and deceptive practices act); *Colt Industries v. Fidelco Pump & Compressor Corp.*, 700 F. Supp. 1330, 1333 (D.N.J. 1987), *aff'd*, 844 F.2d 117 (3d Cir. 1988) (New Jersey and Connecticut franchise owners were entitled to the protection offered by New Jersey and Connecticut franchise acts despite New York choice of law provision in their contracts); *McKeown Distrib., Inc. v. Gyp-Crete Corp.*, 618 F. Supp. 632, 643 n. 5 (D. Conn. 1985) ("The parties election to have the law of Minnesota govern the Agreement . . . does not affect the availability to the plaintiff of a claim under the Connecticut Unfair Trade Practices Act"); *North Am. Bank Ltd. v. Schulman*, 474 N.Y.S.2d 383, 386-7 (Co. Ct. 1980) (choice of law clause did not prevent the application of the forum state's usury statutes); *Alden's, Inc. v. Miller*, 610 F.2d 538 (8th Cir. 1979), *cert. denied*, 446 U.S. 919 (1980) (Iowa Uni-

form Consumer Credit Code applied to mail order transaction with Illinois corporation despite Illinois choice of law clause); *Turner v. Alden's, Inc.*, 433 A.2d 439, 441-2 (N.J. Super. Ct. App. Div. 1981) (court expressly relies on "intended scope" analysis); *Barnes Group, Inc. v. C & C Products, Inc.*, 716 F.2d 1023, 1029-33 (4th Cir. 1983); *National Accept. Corp. v. Hurm*, No.84L-JN-7, 1989 WL 70953 at *4 (Del. Super. June 16, 1989) (court refused to enforce choice of law clause because it was "contrary to Delaware's strong policy of protecting resident homeowners from foreclosure" and stated "it is not acceptable for out of state credit sources to come into Delaware for the purposes of soliciting Delaware business in contravention of Delaware statutes"); *Physicians Weight Loss Centers of America v. McLean*, No. 90-CV-2065, 1991 U.S. DIST. LEXIS 13107 (D. Ohio June 28, 1991) (the policy of protecting "consumers/franchisees from the superior bargaining strength of franchisors and/or the unscrupulous practices of commercial sellers" prevented application of choice of law provision); *Rutter v. BX of Tri-Cities, Inc.*, 806 P.2d 1266 (Wash. Ct. App. 1991); RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 187(2)(b) and cmt. g (1971) (a "fundamental policy may be embodied in a statute which makes one or more kinds of contracts illegal or which is designed to protect a person against the oppressive use of superior bargaining power").

⁷¹ *Potomac Leasing Co. v. Chuck's Pub, Inc.*, 509 N.E.2d 751 (Ill. App. Ct., 1987); *Janice Doty Unlimited, Inc. v. Stoecker*, 697 F. Supp. 1016 (N.D. Ill. 1988) (claim could not be maintained under the Illinois Act where parties' contract provided for the application of Georgia law); *Mayoff v. Hartford Life & Acci. Ins. Co.*, No. 90 C 0571, 1990 U.S. Dist. LEXIS 12467 (N.D. Ill. Sept. 20, 1990); *Continental Illinois Nat'l Bank & Trust Co. v. Premier Systems, Inc.*, No. 88 C 7703, 1989 U.S. Dist. LEXIS 10833 (N.D. Ill. Sept. 12, 1989).