ILLINOIS CONSUMER FRAUD:
A PRIMER ON RECENT DEVELOPMENTS

By James R. Keller

Scope Note:

Lawsuits are popping up everywhere on the Illinois Consumer Fraud and Deceptive Business Practices Act. This article examines the present state of the law for private causes of action.

Original Publication:

This article originally appeared as Illinois Consumer Fraud Act: A Primer on Recent Developments, 474/Illinois Bar Journal/September 1999/Vol. 87.

Biography:

James R. Keller is a partner in the St. Louis firm of Herzog, Crebs & McGhee, LLP, where he concentrates his practice in Illinois and Missouri on business litigation and construction law. He received his B.J., Kappa Tau Alpha, from the University of Missouri School of Journalism in 1977 and his J.D. from Washington University in 1980 where he was managing editor of the Urban Law Annual. He also is a panelist with the American Arbitration Association.

The author gratefully acknowledges Wendy Wiedemann Hudson, staff attorney with Thompson Coburn, without whose skillful editing and valued research this article would not have occurred.

ILLINOIS CONSUMER FRAUD:
A PRIMER ON RECENT DEVELOPMENTS

I. INTRODUCTION

Illinois' case books and advance sheets have exploded recently with decisions on the Illinois Consumer Fraud and Deceptive Business Practices Act.[1] The Illinois Supreme Court has crafted a lengthy opinion on the Act in June 1999,[2] three more in 1998,[3] and eight since October 1996.[4] The Illinois appellate district courts have been busy, too. They have issued at least a dozen opinions since November 1998 and at least twenty-four since January 1998. What is happening?

Unnoticed by many of us, the appellate courts have been rapidly grinding, sharpening and polishing the Act into a dangerous, if not lethal, weapon. Creative plaintiffs' lawyers are using the Act in novel ways, including recent cases involving insurance policies,[5] RICO[6] and medical laboratory billing practices.[7]

Like all causes of action, however, the Act still has its limitations. This article examines the recent developments and the present state of the law. The Act should now be on the checklist of issues to consider for those who try cases, and those who try to avoid them.

II. THE ACT

A. Purpose of the Act

What is the Act? It protects Illinois consumers, borrowers and in some cases businesses from fraud, unfair competition and deceptive business practices.[8] Appropriately, its nickname is consumer fraud. Obviously, the Act covers sneaky businesses engaged in sham operations to prey upon unsuspecting consumers for illicit profit. Perhaps surprisingly, the Act may also cover

legitimate companies that innocently misrepresent their products. The Act is broad and is to be liberally construed to accomplish consumer protection."[9]

B. The Act Compared to Common Law Fraud

Roughly speaking, the Act is a shortened version of common law fraud. Both require a complaint that is well-pled, particular and specific.[10] Common law fraud has five elements:

(1) a false statement of material fact; and

(2) defendant's knowledge that the statement was false; and

(3) defendant's intent that the statement induce plaintiff to act; and

(4) plaintiff's reliance upon the truth of the statement; and

(5) plaintiff's damages resulting from reliance on the statement.[11]

By contrast, consumer fraud has only three elements to prove a violation of the Act:

(1) a deceptive act or practice by defendant; and

(2) defendant's intent that plaintiff rely on the deception; and

(3) the deception occurred in the course of conduct involving trade or commerce.[12]

A violation permits the Attorney General to bring a lawsuit.[13] For a private person to sue, which is the focus of this article, there must be a violation and a fourth element:

(4) actual damage to plaintiff as a result of defendant's violation of the Act.[14]

The element never needed to prove consumer fraud, but always needed to prove common law fraud, is plaintiff's reliance upon the truth of defendant's statement or defendant's conduct.

Common law fraud requires proof by clear and convincing evidence on at least its first two elements.[15] Such proof may in fact be needed on all five elements, depending upon the facts, or precedent from the District Court in question.[16] To the contrary, consumer fraud only requires

proof by a preponderance of the evidence.[17] In the hands of a skilled advocate, this difference could make an otherwise "iffy" case quite strong.

C. The Elements of Consumer Fraud

Recently, the appellate courts have considered each of the Act's four elements. They have in some cases defined and in most cases refined the Act, as follows:

1. A Deceptive Act or Practice

Establishing a deceptive act or practice can be quite easy or very difficult, depending upon the facts. There still is no substitute for strong facts. For example, in *Connick v Suzuki Motor Co., Ltd*.,[18] the Illinois Supreme Court found it sufficient to plead that Suzuki falsely represented to Car and Driver magazine that the Samuri had special safety features to protect passengers during a rollover accident. Even innocent misrepresentations, however, may trigger the Act, according to two Supreme Court decisions in 1998 and 1995.[19] The Act does not require "knowledge or belief by [defendant] that the statement was untrue.[20]

By definition, the Act covers deception. Deception includes a failure to disclose as well as an affirmative misrepresentation. In *Kirkruff v Wisegarver*,[21] the court found that the failure of a real estate broker to provide written notice he was acting on his own behalf, his failure to list the property for sale as agreed, and his failure to use his best efforts were omissions covered under the Act.

Deception did not exist, however, in *Zekman v Direct American Marketers, Inc.*[22] decided by the Supreme Court last year. In this case defendant knowingly received the benefits of someone else's fraud. However, defendant did not itself engage in the deception. The Court declined to extend the Act to include "third parties" who merely benefited from another's fraud. In 1996, the Supreme Court would not apply the Act where defendant made representations

based upon an erroneous interpretation of the Motor Vehicle Retail Installment Sales Act.[23] Given uncertainty about what was needed to comply with the Sales Act, the Supreme Court concluded that even if false, the representations were not actionable.

Similarly, the First District in *Skyline International Development v Citibank*,[24] held that the Act did not apply to an "isolated misstatement" about whether a bank wire transfer would be cancelled. After making the statement, defendant's employee realized the transfer could not be cancelled simply upon his request. "This is not the type of misstatement that raises the consumer protection concerns the Act was intended to address."[25] After all, the Court noted, the "Act is not applicable to every wrong caused to a consumer."[26]

2. The Defendant's Intent that the Plaintiff Rely on the Deception

For the second element, plaintiff must show that defendant intended that plaintiff rely on defendant's fraud or deception. Plaintiff does not need to plead or prove that plaintiff actually relied on the deception.[27]

In *Martin v Heinhold Commodities, Inc.*, the Supreme Court decided there can be a viable cause of action even where defendant did not know or believe its statement was untrue, as long as defendant intended for such reliance.[28] This differs from the second element of common law fraud, which is: "defendant's knowledge that the statement is false."

In 1997, the Supreme Court in *Stern v Norwest Mortg., Inc.*[29] found that even though defendant violated the Illinois Mortgage Escrow Account Act by wrongly charging an escrow waiver fee, it did not violate the Consumer Fraud Act. The court concluded that defendant did not intend to deceive, defraud or be unfair to plaintiffs, since the Escrow Account Act had not yet been construed by a court.[30] Thus, defendant merely made an "honest mistake."[31] The Court held that defendant did not conceal any fact with intent that plaintiff would thereon rely.[32]

Similarly, the Fifth District recently decided that a "misrepresentation may have been made 'innocently' in that there is no intent to deceive."[33] According to this Court, not all misrepresentations or omissions are actionable; only those for which culpability can be shown.[34] This position seems pretty close to the common law fraud requirement that a defendant know his statement is false.

3. The Deception Occurred During Trade or Business

The third element is that defendant must be engaged in a trade or business. This element eliminates most private disputes. By design, the Act protects consumers from businesses, not necessarily from fellow consumers.[35] Media owners, publishers, sellers and brokers of real estate are expressly excluded unless they knew of the false, misleading or deceptive information.[36] In October 1998, the Illinois Supreme Court decided, in a case of first impression, that the Act completely excludes client lawsuits against their lawyers.[37] All lawyers should breath a sigh of relief that attorney-client relationships cannot be "regulated" or prosecuted through the Act.[38]

By definition, the Act also does not apply to any action specifically authorized by laws administered by "any regulatory body or officer acting under statutory authority of this State or the United States."[39] The Supreme Court of Illinois applied this provision in its most recent case, *Weatherman v. Gary-Wheaton Bank of Fox Valley*,[40] decided June 17, 1999. The Court upheld the dismissal of a Complaint alleging consumer fraud when a mortgage lender's actual closing costs were not exactly the same as the estimate provided earlier. Since the estimate complied with the Real Estate Settlement Procedures Act, 12 U.S.C. § 2601 (1994), defendant was "exempt from liability under the Consumer Fraud Act."[41]

The First District in *Beckett v. H&R Block, Inc.*[42] applied this same provision of the Act on June 30, 1999, to affirm a trial court's dismissal of a lawsuit. Plaintiffs alleged that

defendants violated the Act by, among other points, not including an electronic filing fee in the finance charge, attracting customers by providing unrealistically low APRs and using misleading and deceptive business forms.

The Court concluded that since defendants complied with the Truth in Lending Act (TILA), 15 U.S.C. 33 1601-1667e (1994), they did not violate the Consumer Fraud Act. The plaintiffs could not recover even though there may have been kickbacks and a "bait-and-switch" policy, given compliance with the TILA. While the Court was not "unthralled with at least an appearance of misrepresentation occasioned by kickbacks,"[43] it concluded that only the legislature could extend liability beyond disclosure sanctioned by the TILA

Frequently, attorneys attempt to apply the Act to cases involving contract disputes between businesses. This raises two problems: (1) does the Act apply in a breach of contract case, and (2) does it apply to disputes between businesses?[44]

The Illinois courts created the "consumer nexus test" to answer these questions. If a claim under the Act is premised upon breach of contract, the plaintiff must allege a nexus between the complained-of conduct and consumer protection concerns. The plaintiff bears the burden of proof on this point *by clear and convincing evidence*.[45]

Using this test, the Second District found that consumer protection concerns were inherently implicated in a contract between an educational institution and its student. The Court concluded, however, that plaintiff's complaint was deficient because plaintiff failed to plead "an implication of consumer protection concerns."[46] Specifically, plaintiff had to plead and prove:

(1) that plaintiff's actions were akin to a consumer's actions; and

(2) how defendant's representations regarding plaintiff's chances of being accepted into defendant's medical school concerned consumers other than themselves; and

(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.[47]

Likewise, disputes between businesses must satisfy the consumer nexus test.[48] Applying this test, the Second District in *Lake County Grading Co. of Libertyville, Inc. v Advance Mechanical Contractors, Inc.*,[49] held that a contractor could not sue its subcontractor under the Act. However, a plaintiff business may be able to sue a defendant business which sent brochures to plaintiff's customers that falsely reported what plaintiff charged for automobile service inspections.[50]

4. Damages

a. What Can Be Recovered

Given a violation of the Act, a private cause of action exists for any person who suffers *actual damage* as a result of such violation.[51] Perhaps no other statute in Illinois offers a greater depth or range of recovery than the Consumer Fraud Act. A violation and actual damage allow a court, *in its discretion*, to award actual economic damages, injunctive relief, punitive damages, reasonable attorney fees, court costs, and "any other relief which it deems proper."[52] These remedies give the Act long, sharp teeth, and provide a real incentive to settle, sometimes for considerable money.

A good, recent example is *Steinberg v. System Software Associates, Inc.*, [53] The First District affirmed a dismissal of a class action, after plaintiffs had agreed to a settlement guaranteeing at least $2,200,000 for alleged violations of the Act. Plaintiffs were purchasers of defendant's common stock and claimed overstated revenue performance by defendant.

b. Casual Connection Between Fraud and Damage

To recover damages, a plaintiff must show that the deception or fraud directly and proximately caused plaintiff's injury.[54] This element aligns the Act closely with common law fraud. In fact, in *Martin v Heinhold Commodities, Inc.*,[55] the Supreme Court held that the same level of proof exists for damages under the Act as for damages under common law fraud.[56] Accordingly, the damages still must be "proper".[57]

In *Zekman v Direct American Marketers, Inc.*, the causation requirement prevented plaintiff from recovery. The Supreme Court was not convinced that a plaintiff who received notices that he won various prizes had been damaged by such alleged fraud when he had not in fact won what he thought.[58]

Last year, the Supreme Court in *Cripe v. Leiter* found that a claim based on fear of contracting AIDS, without proof of actual exposure, was "too speculative."[59] In *Gragg v Calandra,*[60]the Second District held that plaintiff failed to show a connection between representations to the public at large and surgery performed on plaintiff without her consent. Unless plaintiff could link a misrepresentation to plaintiff's damage, there could be no recovery.

Neither *Cripe* nor *Gragg* ruled out a personal injury damage claim under the right circumstances. Almost all cases involving the Act, however, seek damages for economic loss rather than personal injury. No matter what the damage or injury, it must be connected to the deception or fraud.

c. Attorney Fees

A trial court may, in its discretion, award attorney fees to the prevailing party. By statute, the fees must be reasonable.[61] A trial court should consider the following when deciding whether to award attorney fees:

(1) the time and labor required; and

(2) the novelty and difficulty of questions involved; and

(3) the experience and ability of counsel; and

(4) the skill necessary to perform the legal services rendered; and

(5) the customary fees charged for such services; and

(6) the benefits to the client.[62]

In a multi-count complaint, with various legal theories alleged, the fees may be awarded only for work relating to the allegations under the Act.[63] This could require some rather sophisticated record keeping, and perhaps some creative argument about how much time actually was spent on the Act compared with other portions of the lawsuit.

At least one appellate court, the Third District, has decided that a trial court must apply a higher standard when awarding attorney fees to a prevailing defendant.[64] The factors discussed above apply when the plaintiff won at trial. To award attorney fees to a victorious defendant requires more, according to the Third District. Defendant must show that plaintiff acted in bad faith.[65] To require less than bad faith, according to the Third District, would "seriously undermine the Act's goal of vindicating consumers' rights."[66] If there is bad faith, the other six factors then come into play.

The lawyers for both sides should focus on the fee issue while it is still pending before the trial judge. The standard of review is abuse of discretion; this makes difficult the reversal of any decision by a trial judge on attorney fees.

Anyone bringing a lawsuit looks for a cause of action with minimal proof or maximum punch. Consumer fraud actions offer both. The broad damage provision invites a count on the Act whenever possible in every complaint, especially when the attorney fees may exceed – perhaps by several fold – the actual damages. The attorney fee provision also encourages

lawsuits which otherwise might not be pursued. The legitimate threat of attorney fees may increase the settlement value of the case. For a defendant, the stakes become higher, should it lose.

d. Punitive Damages

Although recoverable, punitive damages are disfavored by the Illinois Supreme Court.[67] Plaintiff must allege and prove that defendant's "misconduct is outrageous either because the acts are done with malice or an evil motive or because they are performed with a reckless indifference toward the rights of others."[68] Whether the facts and circumstances justify imposition of punitive damages is a question of law.[69] This standard seems to parrot common law fraud.

Accordingly, the standard is high. In *Smith v Prime Cable of Chicago*,[70] the Illinois Supreme Court found that plaintiff did not properly plead punitive damages by stating that defendants "knowingly" and "falsely, deceitfully and fraudulently" misrepresented the length of a concert.[71] Punitive damages should only be awarded to punish defendant and deter similar offenses in the future.[72] Their purpose is not to compensate plaintiff.[73] While difficult to obtain at trial, an award of punitive damages is even harder to overturn on appeal.[74]

III. SPECIAL CONSIDERATIONS

The Act requires some special considerations, including:

a. Trial by Judge not Jury

There is no right to a jury trial.[75] A judge decides a cause of action under the Act. This presents an interesting and frequent problem. Most cases involving the Act also include other counts which normally a jury decides – such as breach of contract and fraud. In fact, almost all of the cases examined in this article included additional causes of action which required a jury.[76]

One solution is to try all the counts together. The judge will decide those counts brought under the Act. The jury will decide the rest.[77] Since proof often overlaps, this approach seems to make economic sense. Alternatively, there may be strategic reasons a party wishes to have the counts tried separately. A practitioner can expect resistance from the court to use this procedure since separate trials may be less expedient. Ultimately, the trial judge decides this issue.

b. A Three-Year Statute of Limitations

The lawsuit must be brought within three years after the cause of action accrued.[78] This is shorter than many other statutes of limitation, such as ten years for breach of written contracts,[79] and five years for most tort actions, including fraud.[80] Illinois applies the discovery rule to determine when a cause of action accrued within the meaning of the Act.[81] Accrual starts when the party knows or reasonably should know both that an injury has occurred and that it was caused wrongfully.[82] At that point the party should inquire further to determine whether there is an actionable wrong.[83]

c. Arbitration

The Act applies to arbitration as well as trial. Arbitration may occur when authorized by the mandatory arbitration procedures in Illinois Supreme Court Rules 86-95. Arbitration also may occur when specifically agreed by the parties. Once a matter goes to arbitration, all relief allowed under the Act, including attorney fees to the prevailing party, must be presented to and decided by the arbitrators.[84] The trial court has no jurisdiction to decide any part of the request for relief.[85]

Arbitration does not necessarily diminish a potential recovery. Consider, for example, what happened in *Father & Sons, Inc. v Taylor*,[86] decided in November 1998. A contractor sued homeowners for about $19,000 under a contract for work on a new addition. The homeowners

counterclaimed in five counts including common law fraud and consumer fraud. The court sent the case to binding arbitration due to an arbitration provision in the construction contract.

The arbitrator denied the contractor's claim. Instead, the arbitrator awarded the homeowners on their counterclaim $40,000 to remedy defects in the home, $22,006 for litigation experts, $75,000 for attorney fees, and $1,400 for AAA expenses. The arbitrator also declared the contractor's mechanic lien on the home to be null and void. What started as a $19,000 claim by the contractor ended with a $138,406 judgment against the contractor including attorney fees exceeding fifty percent of the award. The First District on appeal affirmed the entire award.[87]

d. Venue

The Act provides that the lawsuit may be filed in the county where the person against whom it is brought resides, or where defendant has its principal place of business, or is doing business, or in the county where the transaction or any substantial portion thereof occurred.[88] This gives the plaintiff many options.

IV. CONCLUSION

The Act has become a popular cause of action. Litigation involving the Act is not slowing. If anything, we can expect more, not less, activity in the years to come.

It certainly should be strongly considered whenever common law fraud exists. The damage recovery is broad. The burden of proof is less stringent. Ample Supreme Court authority exists to support recovery under a variety of circumstances.

Potential defendants can take some comfort in knowing, however, that despite these recent developments, the Illinois Supreme Court has not upheld a cause of action under the Act in its last six decisions.[89] While application of the Act is broad, it is far from automatic.

---

[1] 815 ILCS 505/1 to 515/12 (West 1998).

[2] *Weatherman v. Gary-Wheaton Bank of Fox Valley*, 1999 WL 412 309 (Ill 1999)

[3] The cases are *Cripe v Leiter*, 184 Ill 2d 185, 703 NE2d 100 (1998); *Majca v Beekil*, 183 Ill 2d 407, 701 NE2d 1084 (1998); and *Zekman v Direct American Marketers, Inc.*, 182 Ill 2d 359, 695 NE2d 853 (1998).

[4] The other four cases are *Cruz v Northwestern Chrysler Plymouth Sales, Inc.*, 179 Ill 2d 271, 688 NE2d 653 (1997); *Stern v Norwest Mortgage, Inc.*, 179 Ill 2d 160, 688 NE2d 99 (1997); *Lee v Nationwide Cassel*, 174 Ill 2d 540, 675 NE2d 599 (1997); and *Connick v Suzuki Motor Co., Ltd.*, 174 Ill 2d 482, 675 NE2d 584 (1996).

[5] *Yamada Corp. v. Yasuda Fire and Marine Insurance Co.*, 1999 WL 360271 (Ill App 2nd D 1999)

[6] *Wallace Acquisitions, Inc. v. Allied Waste Industries, Inc.*, 1999 WL 239461 (Ill App 1st D 1999) (a class action against a solid waste management company based on a 3% surcharge; the appellate court remanded the case for trial).

[7] *May v. SmithKline Beecham Clinical Laboratories, Inc.*, 304 Ill App 3d 242, 710 NE2d 460 (1999) (applying the Act in a class action against a medical laboratory).

[8] *Cripe*, 184 Ill 2d at190-91.

[9] 815 ILCS 505/11a (West 1973).

[10] *Connick v Suzuki Motor Co., Ltd.*, 174 Ill 2d 482, 501, 675 NE2d 584 (1996).

[11] *Id*, 174 Ill 2d 482 at 496. *See also Illinois Pattern Jury Instructions*, 800.02A (1995), dealing with fraud and deceit.

[12] *Cripe*, 184 Ill 2d 185 at 191. These elements follow the provisions of the Act in 815 ILCS 505/2 (West 1973).

[13] 815 ILCS 505/7 (West 1998). There is no need to allege or prove any damage for the Attorney General to sue. Prior to a lawsuit, the Attorney General also has broad powers to investigate the target defendant, require answers under oath in writing or at deposition, and pursuant to court order, impound any document or merchandise. 815 ILCS 505/3 (West 1973).

[14] 815 ILCS 505/10a(a) (West 1996).

[15] *See Illinois Pattern Jury Instructions*, 800.02A, notes on use. The Fifth District requires proof by clear and convincing evidence for all five elements. *Wright v Richards*, 144 Ill App 3d 450, 457, 494 NE2d 1269 (5th D 1986).

[16] *Id*.

[17] *Malooley v* Alice, 251 Ill App 3d 51, 621 NE2d 265 (3rd D 1993).

[18] *Connick*, 174 Ill 2d at 503.

[19] *Cripe*, 184 Ill 2d at 191 and *Smith v Prime Cable*, 276 Ill App 3d 843, 856, 658 NE2d 1325 (1st D 1995).

[20] *Martin v Heinhold Commodities, Inc.*, 163 Ill 2d 33, 75, 643 NE2d 734 (1994).

[21] 297 Ill App 3d 826, 840, 697 NE2d 406 (4th D 1998).

[22] *Zekman v Direct American Marketers, Inc.*, 182 Ill 2d at 369, 373, 695 NE2d 853 (1998).

[23] *Lee v Nationwide Cassel, L.P.*, 174 Ill 2d 540, 550, 675 NE2d 599 (1996).

[24] 302 Ill App 3d 79, 706 NE2d 942 (1st D 1999).

[25] *Id*.

[26] *Id*. at 4.

[27] *Connick*, 174 Ill 2d at 501.

[28] *Martin*, 163 Ill 2d at 76.

[29] 179 Ill 2d 160, 688 NE2d 99 (1997).

[30] *Id*.

[31] *Id*.

[32] *Id*.

[33] *Elson v State Farm Fire and Casualty Co.*, 295 Ill App 3d 1, 14, 691 NE2d 807 (1st D 1998).

[34] *Id*.

[35] *See Connick*, 174 Ill 2d at 504.

[36] 815 ILCS 505/10b(3) (West 1996).

[37] *Cripe*, 184 Ill 2d 185.

[38] *Id*.

[39] 815 ILCS 505/10b(1) West 1996

[40] 1999 WL 412309 (Ill. 1999)

[41] Id at 7.

[42] 1999 WL 442154 (Ill App 1st D 1999).

[43] Id. at 6.

[44] *Brody v Finch Univ. of Health Sciences/The Chicago Medical School*, 298 Ill App 3d 146, 698 NE2d 257 (2nd D 1998).

[45] *Id*, 298 Ill App 3d at 160.

[46] *Id*.

[47] *Id*.

[48] *Peter J. Hartmann Co. v Capital Bank and Trust Co.*, 296 Ill App 3d 593, 694 NE2d 1108 (1st D 1998).

[49] 275 Ill App 3d 452, 459, 654 NE2d 1109 (2nd D 1995).

[50] *Downers Grover Volkswagon, Inc. v Wigglesworth Imports, Inc.*, 190 Ill App 3d 524, 534, 546 NE2d 33 (2nd D 1989).

[51] 815 ILCS 505/10a(a) (West 1996).

[52] *Id* at 505/10a(a) and (c).

[53] 1999 WL 404617 (1st D 1999)

[54] *Zekman*, 182 Ill 2d at 373.

[55] 163 Ill 2d 33, 68-69, 643 NE2d 734 (1994).

[56] *Id*.

[57] *Id*.

[58] *Id*.

[59] *Majca v Beekil, 183 Ill 2d 407, 420, 701 NE2d 1084 (1998).*

[60] 297 Ill App 3d 639, 648, 696 NE2d 1282 (2nd D 1998).

[61] 815 ILCS 505/10a(c) (West 1996).

[62] *Cruz v Northwestern Chrysler Plymouth Sales, Inc.*, 179 Ill 2d 271, 280, 688 NE2d 653 (1997).

[63] *Schorsch v Fireside Chrysler-Plymouth, Mazda, Inc.*, 286 Ill App 3d 1028, 1031-32, 677 NE2d 976 (2nd D 1997).

[64] *Casey v Jerry Yusim Nissan, Inc.*, 296 Ill App 3d 102, 108, 694 NE2d 206 (3rd D 1998).

[65] *Id*.

[66] *Id*.

[67] *Smith v Prime Cable of Chicago*, 276 Ill App 3d 843, 858, 658 NE2d 1325 (1st D 1995).

[68] *Id*.

[69] *Id*.

[70] *Id*.

[71] *Id*.

[72] *Johnson v Anchor Organization for Health Maintenance*, 250 Ill App 3d 393, 397-98, 621 NE2d 137 (1st D 1993).

[73] *Id*.

[74] *Black v Iovino*, 219 Ill App 3d 378, 392, 580 NE2d 139 (1st D 1991).

[75] *Martin*, 163 Ill 2d 33.

[76] The two cases are *Cahnman v Agency Rent-A-Car System, Inc.*, 299 Ill App 3d 54, 701 NE2d 512 (1st D 1998) and *Casey v Jerry Yusim Nissan, Inc.*, 296 Ill App 3d 102, 694 NE2d 206 (3rd D 1998).

[77] *See* Ill Supreme Court 232.

[78] 815 ILCS 505/10a(e) (West 1996).

[79] 735 ILCS 5/13-205 (West 1998).

[80] 735 ILCS 5/13-205 (West 1998).

[81] *Hermitage Corp. v Contractors Adjustment Co.*, 166 Ill 2d 72, 85-86, 61 NE2d 1132 (1995).

[82] *Id*, citing from *Nolan v Johns-Manvile Asbestos*, 85 Ill 2d 161, 170-71, 421 NE2d 864 (1981).

[83] *Id*.

[84] *Cruz v Northwestern Chrysler Plymouth Sales, Inc., 179 Ill 2d 271, 280, 688 NE2d 653 (1997).*

[85] *Id*.

[86] 703 NE2d 532 (1st D 1998).

[87] *Id*.

[88] 815 ILCS 505/10a(b) (West 1996).

[89] *Weatherman*, 1999 WL 412309; Cripe, 184 Ill 2d 185; *Majca*, 183 Ill 2d 407; *Zekman*, 182 Ill 2d 359; *Stern*, 179 Ill 2d 160; and *Lee*, 174 Ill 2d 540.