Weiss Bershad & Schulman, and partners Bershad and Schulman were charged with a twenty-year racketeering conspiracy, mail fraud, money laundering, filing false tax returns and obstruction of justice in making more than $11 million in secret payments to three individuals who served as plaintiffs in more than 150 lawsuits that generated more than $216 million in fees for the firm and its predecessors. This is the first time a law firm of national standing has faced criminal charges of this nature on this scale. The government alleges that the payments were moved as cash through casinos and in a credenza in Mr. Bershad's office.[4]

Mr. Lazar of Palm Springs

Some of the firm's most recent troubles date back to Milberg Weiss's association with an unusually colorful entertainment lawyer/securities trader/counterculture figure turned professional plaintiff named Seymour Lazar. Lazar has allegedly made his living for several decades working with Mr. Weiss and Willliam Lerach bringing lawsuits against corporations that they felt were defrauding shareholders or consumers. In January of 2006, Seymour Lazar came under federal investigation.

Lazar is described in news reports as an iconoclast lawyer who turned from an eclectic entertainment law practice in the 1960s to stock trading as a client of Cantor Fitzgerald in the 1970s, where he found more money could be made trading merger and acquisition stocks than practicing law. After an enforcement action by the SEC in 1969 accused Mr. Lazar and a secret group of investors of stock manipulation of Armour & Co. and General Host Co., a food company seeking to acquire Armour, resulting in a 1975 consent settlement with no admission or denial of guilt, Melvyn Weiss brought a 1973 class action on behalf of Armour's shareholders against the Lazar group. That lawsuit ultimately was dismissed, but was notable for having introduced Mr. Lazar to Melvyn Weiss, a founding partner of Milberg Weiss.

This encounter with the SEC and trading losses of $10 million on the deal led Lazar to move to Palm Springs to reconsider his mode of employment. After a flirtation with litigation with palimony tsar Marvin Mitchelson, involving the Howard Hughes estate, Lazar turned to Milberg Weiss and made his money in part from suing corporations such as Hertz for overcharging for gas, and other corporations for alleged misdeeds. In an indictment unsealed in June 2005, a federal grand jury accused him of criminal acts related to more than fifty lawsuits filed over more than twenty-five years in which he or a family

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New Trend in Illinois Supreme Court Rulings?

by Tara A. Fumerton

In December 2006, the American Tort Reform Foundation released its 2006 list of "Judicial Hellholes," an annual publication that identifies and ranks those jurisdictions across the country where, in their words, "scales of justice" tip heavily in favor of one party, usually plaintiffs.[1] Three Illinois jurisdictions (Cook County, Madison County and St. Clair County), known as havens for class-action plaintiffs' lawyers, again made the list.[2] What is surprising, however, is their ranking on it. Each of these counties moved down in the list of those jurisdictions exhibiting the worst judicial abuses from #2, #3 and #5 respectively in 2005 to #4, #5 and #6 in 2006.[3] In the past year and a half the Illinois Supreme Court has issued three major decisions that have significantly dampened plaintiffs' lawyers' enthusiasm to utilize Illinois as the jurisdiction of choice for nationwide class actions.

The first of the decisions, *Avery v. State Farm Mutual Automobile Insurance Company* (August 2005), invalidated a billion dollar class-action plaintiffs' verdict, holding that class certification was improper for numerous reasons and that, in any event, plaintiffs had failed to establish any damages.[4] While the eighty-one-page decision was a blow to the class action machine, of particular importance was the court's ruling that the frequently abused Illinois Consumer Fraud and Deceptive Business Practices Act ("Consumer Fraud Act"),[5] could not be the basis of a nationwide class.[6] Out-of-state plaintiffs had frequently filed class actions in Illinois using that Act as their primary vehicle.

In *Avery*, five named plaintiffs (only one of which was a resident of Illinois) represented a nationwide class of State Farm Mutual Automobile Insurance Company ("State Farm") policyholders who alleged that State Farm breached their policy agreements and violated the Illinois Consumer Fraud Act.[7] This was in connection with State Farm's practice of specifying the use of car repair parts that were not affiliated with the original equipment manufacturers ("non-OEM" parts), as opposed to new parts from the automobile's original manufacturer ("OEM" parts), in approving claims for the repair of policyholders' vehicles. More specifically, plaintiffs alleged that State Farm's practice of specifying the use of non-OEM parts: (1) breached State Farm's standard contract because it does not restore policyholders' cars to their pre-loss condition by using parts of like kind and quality; and (2) constituted an actionable misrepresentation under the Illinois Consumer Fraud Act regarding the "standard, quality or grade of the goods and services" provided under the State Farm insurance policy.[8]

State Farm insisted that the substance of policies varied from state to state (destroying the element of commonality), and that four of the five named plaintiffs had little to no connection with the State of Illinois. But the circuit court certified a nationwide class with respect to both the breach of contract and consumer fraud claims.[9] At trial, though no plaintiff proved that they suffered any actual injury, the jury awarded plaintiffs over $1 billion in damages.[10] On appeal, the Fifth District Appellate Court (the appellate court for both Madison and St. Clair counties) generally affirmed the circuit court's decision.[11]

The Illinois Supreme Court, however, reached a very different conclusion. With respect to the breach of contract claim, the court held that "there is simply no evidentiary support for the lower courts' conclusion that all of State Farm's various polices are uniform" and that because the policies are materially different "the commonality and predominance requirement[s] [] cannot be met."[12] The court went on to hold that for multiple reasons the verdict could not even be upheld with respect to any possible subclass.[13] Most notably, it reasoned that the breach of contract verdict may not be upheld with regard to any subclass because plaintiffs failed to establish that any policyholder suffered any *actual damage*.[14]

The court similarly reversed the circuit and appellate court with respect to the Illinois Consumer Fraud Act claim. Without reaching State Farm's arguments that the circuit court's certification of a nationwide class with respect to the Illinois Consumer Fraud Act claims violated Illinois' choice-of-law rules, as well as various federal constitutional provisions, the court held as a matter of statutory interpretation that the Act can only apply "if the circumstances that relate to the disputed transaction occur primarily and substantially in Illinois."[15] As applied to the facts of this case, the court further held that the Act did not permit a cause of action for out-of-state plaintiffs because the "overwhelming majority of circumstances relating to [their] disputed

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Campbell v. Air Touch Cellular d.b.a. Verizon Wireless

by John Shu

This class action settlement involving AirTouch Cellular and Cellco Partnership, which do business as the more commonly known Verizon Wireless, is one of the largest in American history. The lead plaintiff, Marcy Campbell, and the other plaintiffs, filed the original complaint in July 2001 in California Superior Court, San Diego County, before Judge William C. Pate, claiming that Verizon improperly and inadequately disclosed billing, sales and marketing practices. The case went to mediation before Judge J. Lawrence Irving, United States District Court for the Southern District of California (Retired). Judge Irving is currently Special Counsel at Lerach Coughlin Stoia Geller Rudman & Robbins LLP, a well-known plaintiff's class-action firm.

The plaintiffs filed the first amended complaint in November 2001. The nationwide class representatives home states included Arizona, California, Connecticut, Florida, Georgia, Illinois, Indiana, Iowa, Louisiana, Maryland, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Tennessee, Washington and Wisconsin. The complaint asserted six class action and private attorney general claims, asserting causes of action under California Business and Professions Code §§ 17200 and 17500 (Unlawful, Deceptive and Unfair Business Practices; Unfair, Deceptive and Misleading Advertising); the Consumers Legal Remedies Act, Cal. Civ. Code § 1750 *et seq.,* which makes unlawful "methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods to any consumer;" breach of contract; negligent misrepresentation; and fraudulent misrepresentation, concealment and failure to disclose.

The plaintiffs alleged that Verizon utilized a variety of deceptive and misleading marketing, advertising, sales and billing practices in its cellular telephone service, such as miscalculating airtime usage, making unauthorized changes in the terms of its customers' contracts, and charging hidden fees on its customers' accounts.

Campbell and Verizon entered into a class action settlement agreement in April 2002, pursuant to the parties' mediation before Judge Irving. Under the agreement, Verizon agreed to provide a revised customer service agreement and user guide to all current customers. Verizon also agreed to provide a coupon to class members. The coupon could be used for (1) $15.00 off a one-

Verizon Settlement

year contract for wireless service with Verizon; (2) $30.00 off a two-year contract for wireless service with Verizon; (3) a 25% discount on Verizon merchandise, up to a maximum of $15.00; or (4) a free "hands free earbud."

In May 2002 Judge Pate preliminarily approved the proposed settlement agreement and certified a settlement class for the period of January 1, 1991 through and including November 2, 2003. Out of the more than 23 million notices of proposed settlement Verizon mailed to potential class members, it received sixty-two objections and approximately 4,300 opt out requests. Three prominent consumer advocacy groups were among the objectors: Consumers Union of the United States, Inc. (Consumers Union), Utility Consumer Action Network (UCAN), and the Wireless Consumers Alliance (WCA). In September 2002 Judge Pate rejected the proposed settlement primarily because it did not provide sufficient benefits to members of the proposed class and because of deficiencies in the class notice. Judge Pate also expressed concern about the inclusion of an entire customer agreement in the body of the settlement agreement, and the lack of an adequate valuation of the plaintiffs' claims.

The parties returned to mediation before Judge Irving. In October 2003 Campbell, Verizon, and 26 new intervenors, including UCAN and WCA, entered into a revised class action settlement agreement. Verizon agreed to revise its customer service agreement and user guide for all current customers, including making specific disclosures; make its customer agreement available in Spanish; double the time period within which customers could dispute their bills; and provide two separate vouchers to class members. The first voucher allowed class members to choose one of the following without have to enter into or renew a Verizon contract: (1) $15.00 off a one-year contract for wireless service with Verizon; (2) $30.00 off a two-year contract for wireless service with Verizon; (3) six months of limited free text messaging; (4) a 25% discount on wireless telephone accessories up to a maximum discount of $15.00; (5) 120 minutes of long distance via a third-party calling card; or (6) a $3 per bill credit for up to eight months over a two-year contract.

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transactions" occurred outside of Illinois.[16] Moreover, since the lone Illinois-named plaintiff had failed to suffer any actual damage as a result of the violation of the Act, all of the Illinois Consumer Fraud Act claims were dismissed.[17]

In a separate opinion, concurring in part and dissenting in part, Justice Freeman implied that the stark language and apparent shift in philosophy advanced by the majority was a direct reaction to the allegations of abuse in the class action arena that have been leveled at the Illinois courts.[18] While stating that "it would further no end to feign ignorance" of these allegations, he cautioned the majority to "tread carefully" considering the "ongoing national debate" among elected officials in the U.S. Congress and the Illinois General Assembly.[19]

A few months later, in November 2005, the Illinois Supreme Court issued a second decision that made it more difficult for out-of-state plaintiffs to file class actions in Illinois jurisdictions with pro-plaintiff reputations. In *Gridley v. State Farm Mutual Automobile Insurance Company*,[20] the court reversed the lower decisions and ordered the Madison County circuit court to grant State Farm's motion to dismiss based upon forum non conveniens.[21] Gridley, a *Louisiana* resident filed suit in Madison County as a representative of a nationwide class of individuals who had purchased an automobile that was previously declared a "total loss" by State Farm and for which State Farm failed to obtain a salvage title, as required by *Louisiana* statute.[22] In his suit, Gridley alleged two causes of action: (1) unjust enrichment and (2) violation of the Illinois Consumer Fraud Act.[23] State Farm moved to dismiss the complaint, arguing that the Illinois Consumer Fraud Act could not apply to Gridley's complaint (which was premised on events in Louisiana) and that Gridley's remaining common law claim should be dismissed pursuant to the doctrine of forum non conveniens. The circuit court denied State Farm's motion in its entirety, reasoning that Illinois had a "significant interest" in the litigation because State Farm was headquartered in Illinois and Gridley sought recovery under Illinois law.[24]

On appeal, the Fifth District Appellate Court held that the circuit court did not have sufficient facts to make an informed decision on State Farm's forum non conveniens motion and remanded the case for further discovery.[25] In reaching its conclusion, the appellate court focused on the putative class. It concluded that the identity and location of potential class members, as well as the availability of documentary and physical evidence on a class-wide basis, should be considered when making a forum non conveniens decision in the class action context.[26]

The Illinois Supreme Court rejected both the appellate and circuit court decisions. First, the court affirmed its prior decision in *Gridley*, and held that Avery could not bring a claim under the Illinois Consumer Fraud Act, since the Act did not apply to fraudulent transactions which take place outside of Illinois.[27] Second, the court held that the appellate court "improperly focused on the putative class allegations" in its decision to remand the case for further discovery.[28] The court stated:

Given that the nature of a class action is to allow a named representative to act on behalf of any absent class members, it would be antithetical to nonetheless require a court to conduct detailed discovery into the claims of absent class members prior to deciding a *forum non conveniens* motion, particularly where the class has not been certified.[29]

The court further held that the circuit court abused its discretion in denying State Farm's motion, because all relevant factors strongly favored dismissal in favor of a Louisiana forum, especially since virtually all material events occurred in the State of Louisiana.[30]

In December 2005, the Illinois Supreme Court issued a third important class-action decision. In *Price v. Philip Morris, Inc.,*[31] the court again reversed and remanded with instructions to dismiss another class-action case from Madison County that had resulted in astronomical damages of over $10 billion. Plaintiffs in *Price* alleged that Philip Morris's use of the terms "light" and "lowered tar and nicotine" in connection with its Cambridge Lights and Marlboro Lights cigarettes was false and deceptive under the Illinois Consumer Fraud Act.[32] (Plaintiffs also raised claims under the Illinois' Uniform Deceptive Trade Practices Act, but because that statute was not the focus of the court's opinion, it is not discussed here.[33]) The circuit court certified an Illinois class of consumers who purchased these cigarettes for personal consumption between their introduction (late 80's/early 70's) and 2001.[34]

On appeal directly to the Illinois Supreme Court, Philip Morris attacked the circuit court's rulings on multiple fronts, including improper class-certification.[35] The court's decision, however, focused on whether section 10(b)(1) of the Illinois Consumer Fraud Act barred plaintiffs' claims.[36] Section 10(b)(1) of the Act explicitly provides that the Act shall not apply to actions "specifically authorized by laws administered by any regulatory body or officer acting under statutory authority of this State or the United States."[37] In the context of this case, the specific question analyzed by the court was whether the actions of the Federal Trade Commission ("FTC"), a federal entity that had jurisdiction over the advertising and testing of cigarettes, met this requirement. It was undisputed that the FTC acts under federal statutory authority when it administers federal laws regarding the regulation of cigarettes.[38] Accordingly, the remaining question was whether the FTC has specifically authorized the use of the terms "light" and "lowered tar and nicotine" by Phillip Morris. If the question were answered in the affirmative, plaintiffs' Consumer Fraud Act claims would be barred, even if the terms may be false or deceptive.[39] After extensive discussion and review of all available authorities, the Illinois Supreme Court concluded that the FTC did specifically authorize all United States tobacco companies (including Phillip Morris) to use the terms in question, and, therefore, that plaintiffs' claims were barred by section 10(b)(1).[40]

Since plaintiffs' claims were barred in their entirety by section 10(b)(1), the court did not need to reach the other issues raised by Philip Morris. In dicta, however, the court signaled its concern with the circuit court's certification of a plaintiff class of 1.14 million individuals with claims spanning many years.[41] Specifically, the court took issue with the circuit courts' failure to analyze whether the members of the plaintiff class were *actually deceived* by the use of the terms, a requirement of the element of proximate cause required by the Act.[42] The Illinois Supreme Court implied that the circuit court's failure to analyze this issue may have masked the existence of individual issues that might make class certification inappropriate.[43] Moreover, the court also expressed "grave reservations" about the circuit court's "novel approach" to the calculation of damages.[44] This sentiment was echoed by Justice Karmeier, who wrote in a concurring opinion that he believed that plaintiffs' claims should have been dismissed for "a more basic reason: plaintiffs failed to establish that they sustained actual damages."[45]

In a dissenting opinion, Justice Freeman once again expressed his concerns that the Court's rulings were, in part, overcompensating for perceived injustices with respect to class-actions arising from certain jurisdictions. Specifically he stated,

Aspects of the court's opinion today and in its opinion in *Avery* cause me to fear that a majority of my colleagues will continue to hold large class actions to different standards in an effort to reduce the perception that the Illinois court system serves as a playpen for the disingenuous class action practitioner.[46]

Whether these relatively recent developments in Illinois class-action jurisprudence will, however, translate into long-term class-action reform in Illinois is still unknown. Local judges have begun implementing judicial reforms of their own.[47] At least one local commentator has noted that November's Democratic election sweep may have emboldened plaintiffs' attorneys to return to Madison and St. Clair Counties to file class-actions. Prior to the election, only one class action had been filed in those counties since November 2005. However, since November's general election, three new class actions had been filed in just two months.[48] The next year will probably determine whether the recent trend will continue.

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Endnotes

1 ATRF, Judicial Hellholes ii (2006).

2 *Id.* at iv.

3 *Cf.* ATRF, Judicial Hellholes (2005) *with* ATRF, Judicial Hellholes (2006).

4 *See* 835 N.E.2d 801 (Ill. 2005).

5 815 ILCS 505/1 *et seq.*

6 *Id.* at 856.

7 *Avery*, 835 N.E.2d at 810-11.

8 *Id.* at 811 (internal citations omitted).

9 *Avery,* 835 N.E.2d at 812-13.

10 *Id.* at 817.

11 *Id.* at 818-19.

12 *Avery*, 835 N.E.2d at 824.

13 *Id.*

14 *Id.* at 830.

15 *Avery* at 853-54.

16 *Id.* at 854.

17 *Id.* at 858-59.

18 *Avery*, 835 N.E.2d at 881.

19 *Id.*

20 840 N.E.2d 269 (Ill. 2005).

21 *Gridley*, 840 N.E.2d at 272.

22 *Id.*

23 *Id.*

24 *Id.* at 273.

25 *Avery*, 840 N.E.2d at 273.

26 *Id.* at 274.

27 *Id.* at 274.

28 *Id.*

29 *Id.* at 275.

30 *Id.* at 171.

31 848 N.E.2d 1 (Ill. 2005),

32 *Id.* at 19.

33 815 ILCS 510/1 *et seq.*

34 *Id.* at 21.

35 *See Price*, 848 N.E.2d at 32.

36 *Id.*

37 *Id.* at 37 (quoting 815 ILCS 505/10b(1)).

38 *Id.* at 38.

39 *Id.*

40 *Id.* at 50.

41 *Price*, 848 N.E.2d at 51.

42 *Id.* at 52-53.

43 *Id.* at 53.

44 *Id.*

45 *Id.* at 55.

46 *Id.* at 84.

47 *See, e.g., Supreme silence*, Chicago Tribune, December 2, 2006, at 24 (noting that Madison County courts "have set a higher bar for plaintiffs, particularly from out of state, who seek to file class actions.")

48 *See* Steve Gonzalez, *Plaintiffs' attorneys emboldened post election*, The Record, Jan. 25, 2007, at http://www.madisonrecord.com/news/189555-plaintiffs-attorneys-emboldened-post-election.