

No. 129183

In the
Supreme Court of Illinois

TRI-PLEX TECHNICAL SERVICES, LTD.,

Plaintiff-Appellee,

vs.

JON-DON, LLC, LEGEND BRANDS INC., CHEMICAL TECHNOLOGIES
INTERNATIONAL, INC., BRIDGEPOINT SYSTEMS, GROOM INDUSTRIES,
HYDRAMASTER LLC,

Defendants-Appellants.

On Appeal from the Circuit Court of the Twentieth Judicial Circuit,
St. Clair County, Illinois, Case No. 20 L 0237.
The Honorable **Heinz Rudolf**, Judge Presiding.

**AMICUS CURIAE BRIEF OF THE
ILLINOIS TRIAL LAWYERS ASSOCIATION
IN SUPPORT OF THE PLAINTIFF-APPELLEE**

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INTRODUCTION

The Illinois Trial Lawyer's Association (hereinafter "ITLA") is a not-for-profit association whose members specialize in representing injured victims of torts and ensuring access to justice through courts and the Seventh Amendment right to trial by jury. ITLA has a longstanding tradition of promoting access to the courts and protecting the rights of persons who have been injured. ITLA members prepare *pro bono* briefs *amicus curiae* on issues that are of significant interest to its members' clients. ITLA believes the opinion of this Honorable Court on the issues presented in this case will have a substantial effect upon those persons represented by the ITLA's members, as well as having a substantial effect upon public safety throughout Illinois. Based on its members' experience with environmental-related tort litigation, and its organizational concern for the development of law in this area, ITLA is well-positioned to explain why this Court should affirm the Fifth District Appellate Court's opinion. ITLA tenders this brief as Amicus Curiae to provide the court with its views in resolving the questions raised by this case. This brief is submitted in support of the position of Plaintiff-Appellee.

Mindful that it is a privilege and not a right to appear as an *amicus curiae* before the court, ITLA is grateful to do so in this case. Based on the experience of its members, ITLA respectfully submits that its views may be of some assistance in the further development of the law on the important issues before the Court.

ARGUMENT

I. The States' Role as Enforcer Does Not Effect Plaintiff's Claims.

This case involves allegations of Defendants committing fraud on Illinois consumers and businesspersons by advertising and selling banned products throughout the State of Illinois, impliedly representing their products are approved for general use. At issue is Defendants' contention that the Illinois EPA has exclusive authority to regulate the dangerous nature and content of their product. The Fifth District Appellate Court properly reversed the lower court's ruling, and amici respectfully submit that the Court here should affirm the Fifth District Appellate Court opinion.

The ICFA and UDTPA claims provide consumers and businesspersons with broader protection than common law and require liberal construction to eliminate all forms of deceptive or unfair business practices and to provide appropriate relief to consumers. *See* 815 ILCS 505/2; *Totz v. Continental Du Page Acura*, 236 Ill. App. 3d 891, 900 (2d Dist. 1992). To achieve its purpose, the ICFA removes many of the barriers to recovery by reducing the elements of a prima facie case and lowering the standard of proof. *Buechin v. Ogden Chrysler-Plymouth, Inc.*, 159 Ill. App. 3d 237, 250 (2d Dist. 1987) ("The majority of the traditional common law elements have been virtually eliminated by the [Act]."). The perjorative scale weighs in favor of consumers in combating unfair and deceptive business practices, as specifically alleged here.

To avoid being duplicative of the arguments raised by Plaintiff-Appellee, this brief will focus on the jurisprudence and policies of import as to why Plaintiff must be allowed to pursue claims against Defendants under these circumstances. Specifically, allowing an ICFA and UDTPA claim here is not only consistent with Illinois law, but enhances the goals of tort law and incentivizes responsible corporate behavior, ensuring that companies that allegedly harm the general public and misrepresent products are accountable for their actions.

II. Defendants' Position Regarding Home Rule Authority is Unavailing and Should be Disregarded.

A state environmental law does not preclude ICFA nor UDTPA claims against Defendants for their illegal and falsely advertised cleaning products. Defendants' contention to the contrary and reliance on the Home Rule authority provision in the underlying relevant statutory violations is unavailing and misses the mark. State laws that remove home rule authority prevents the home rule counties from passing legislation on that same issue. Home Rule authority simply bears no relevance on private rights of action.

The relevant statute here provides that “the regulation of phosphorus in detergents is an exclusive power and function of the State. A home rule unit may not regulate phosphorus in detergents. This Section is a denial and limitation of home rule powers and functions under subsection (h) of Section 6 of Article VII of the Illinois Constitution.” 415 ILCS 92/5(f).

Defendants cite no case nor authority supporting that taking away Home Rule authority vested exclusive regulatory authority with the EPA. Home Rule is simply irrelevant with respect to private rights of action and the ICFA and UDTPA. The statute did not intend to deprive Plaintiffs of the private right of action. No case law supports the proposition that taking away home rule authority also deprives private litigants of enforcing claims or violations with respect to the same. Home Rule authority simply removes a “Home Rule” county from exercising its own local laws on the same issue, and the Fifth District Appellate Court succinctly addressed this issue.

III. Private Right of Action Affords the Only Proper Tool for Redress

For centuries, private right of action has provided Illinois citizens a crucial tool for protecting their health, safety, and welfare. In most cases, private right of action affords the only remedy and opportunity for protection. And for decades, private actions under the ICFA and UDTPA have provided consumers, borrowers, and businessmen claims against fraud, unfair methods of competition, and unfair or deceptive acts or practices in the conduct of any trade or commerce. *See Sullivan’s Wholesale Drug Co. v. Faryl’s Pharmacy, Inc.*, 214 Ill. App. 3d 1073, 1082 (1991).

The private right of action is a crucial tool to redress health and environmental safety concerns for Illinois residents. Communities that suffer most from toxic exposure and mis-labeled products generally do not maintain the ability to pursue individual claims with respect to products sold under

the guise of fraud and misrepresentation, and individuals often lack the knowledge and resources to vindicate their rights against polluters and violators. Consequently, the claims alleged here are the crucial mechanism for relief from environmental and safety harms to consumers the amici serve.

According to many legal scholars, “there are two goals of modern tort law...[1] to reduce the accident rate as much as is practicable, and [2] to provide a sensible and coherent system of compensation [] for those unfortunate individuals who suffer product or service-related accidents.” *See* Priest, *Modern Tort Law and Its Reform*, 22 VAL. U.L. REV. 1 (1987). Allowing an alleged willfully malicious tortfeasor and fraudulent corporation to ignore laws designed to protect the general health and well-being of Illinois residents would abrogate these goals of tort reform – it would eviscerate the Illinois scheme pertaining to environmental and state-wide regulations through private right of action. In turn, it harms the constitutional framework with respect to the free enterprise system of economic growth throughout this Nation.

IV. Plaintiff’s private right of action is fundamental with respect to the United States’ free enterprise system.

Plaintiff’s Claims under the ICFA and UDTPA enforce claims regarding accurate advertising, which is necessary for our free enterprise system. By the same token, inaccurate information hampers and depletes fair competition and injures consumers and businesses alike.

The free-market economy is reliant on accurate information to ensure the efficient allocation of resources. *See, e.g., Bates v. State Bar of Arizona*, 433 U.S. 350, 364 (1977) (information about the availability, nature and prices of products and services “performs an indispensable role in the allocation of resources in a free enterprise system [and] serves individual and societal interests in assuring informed and reliable decisionmaking.”); *Va. Pharmacy Bd. v. Va. Consumer Council*, 425 U.S. 748, 765 (1976) (accurate information is “indispensable to the proper allocation of resources in a free enterprise system”); *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 363-64 (1973) (noting testimony supporting enactment of the Truth In Lending Act, that “such blind economic activity is inconsistent with the efficient functioning of a free economic system such as ours, whose ability to provide desired material at the lowest cost is dependent on the asserted preferences and informed choices of consumers”).

Accurate information about products and services thus furthers the interests of both consumers and producers. For consumers, access to such information permits them to make welfare-maximizing purchase decisions, attuned to each consumer’s personal desires. For producers, disseminating accurate information reduces individual transaction costs and allows more efficient and compliant producers to reap a larger share of the available market. However, it is only the dissemination of accurate information which furthers these public policy interests. The dissemination of false or

misleading information distorts and obscures the allocation of resources, injuring consumers and business competitors alike.

Overall consumer welfare is maximized where each individual consumer is free to make purchasing decisions based upon accurate information about the nature, quality and price of the goods and services available. The circulation of false information reduces consumer welfare and outlays external costs and negative externalities on unknowing parties.

Illinois' prohibitions on false and misleading advertising are equally important to protect honest competitors. From an economic perspective, a false claim about the characteristics or circumstances surrounding one's own product is no different than a falsely disparaging claim about a competitor's product. Both tend to result in consumer purchases of the "wrong" product (i.e., the consumer would have made a different choice had they been privy to accurate information).

The party that disseminated the inaccurate information earns an undeserved profit. The competitor who did not is robbed of his or her rightful sales, due to consumers' mistaken purchases. *See generally, Serbin v. Ziebart International Corp.*, 11 F.3d 1163 (3rd Cir. 1993) (discussing the Lanham Act's purpose as protecting honest competitors against acts of "unfair competition", such as false advertising). For these reasons, every State, and the Federal Government, has enacted legislation prohibiting false or misleading advertising.

The United States Supreme Court has repeatedly recognized the significant governmental interests underlying those statutes. *See, e.g., Edenfield v. Fane*, 507 U.S. 761, 769 (1993) (“[T]here is no question that Florida’s interest in ensuring the accuracy of commercial information in the market-place is substantial.”); *Va. Pharmacy Bd.*, *supra*, 425 U.S. at 781 (Stewart, J., concurring) (“[T]he elimination of false and deceptive claims serves to promote the one facet of commercial price and product advertising that warrants protection – its contribution to the flow of accurate and reliable information relevant to public and private decisionmaking.”).

These considerations apply fully to Defendants (allegedly) false and misleading statements challenged by Plaintiff-Appellee. Plaintiff alleges that Defendants falsely represented facts about the substances in their carpet cleaning products. Plaintiff alleges *material* factual misstatements and omissions that consumers must know when making purchasing decisions. To the extent that such substances are important to consumer purchasing decisions, Plaintiff-Appellee alleges they were presumably more likely to purchase Defendants’ products because they were more effective but under circumstances that endangered unknowing consumers and Illinois residents. Such false advertising undermined the efforts of those of Defendants competitors and business-persons who incurred greater costs to obtain higher quality cleaning products that complied with Illinois laws. A competitor with alleged lax or nonexistent safety controls simply have the upperhand to

deliver a cheaper and more effective product with a negative unknown cost on the unknowing consumer and people of Illinois who suffer damage from potential toxic exposures to phosphorous and VOMs.

Plaintiff-Appellee's complaint specifically alleges that Defendants intended that its statements would make such purchases more likely. As such, Defendants can command higher prices for its products from those consumers interested in rewarding such practices with brand loyalty. Yet, as alleged, Defendants injected inaccurate information about its own products and the substantive makeup of the same into the marketplace. Consumers (or, at least, some consumers) were unable to differentiate between those brands which contained lower amounts of Phosphorous and VOMs and which were compliant with Illinois environmental requirements, and those that did not. Thus, Defendants' inaccurate statements distorted the efficient marketplace for carpet cleaning products, to the detriment of both consumers and competitors.

Defendants took a business risk by allegedly intentionally mis-labeling and withholding material information concerning the contents of their products. In doing so, Defendants offlaid the negative externalities and risk on Illinois consumers and residents. Illinois surely has a significant interest in prohibiting such distortions by allowing a private market correction through the use of its consumer protection laws, the ICFA and UDTPA. The history of jurisprudence, goals of tort reform, established Illinois case law,

and the public policy incentives all support a ruling affirming the Fifth District Appellate Court's decision in favor of Plaintiff-Appellee, and a reinstatement of the claims herein.

CONCLUSION

The Illinois Trial Lawyers Association is confident that plaintiffs' counsel can and will adequately present the arguments which support the correctness of the decision on review, and it is of course, confident that this Court, upon review of the Record and the arguments of the parties, will issue a just and appropriate decision.

Respectfully submitted,

/s/ Dominic C. LoVerde
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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a), (b), Rule 315(h) and 345. The length of this brief, excluding the pages contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance and the certificate of service is 11 pages.

/s/ Dominic C. LoVerde
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NOTICE OF FILING and PROOF OF SERVICE

In the Supreme Court of Illinois

TRI-PLEX TECHNICAL SERVICES, LTD.,)	
)	
<i>Plaintiff-Appellee,</i>)	
)	
v.)	No. 129183
)	
JON-DON, LLC, et al.,)	
)	
<i>Defendants-Appellants.</i>)	

The undersigned, being first duly sworn, deposes and states that on September 29, 2023, there was electronically filed and served upon the Clerk of the above court the *Amicus Curiae* Brief of the Illinois Trial Lawyers Association in Support of Plaintiff-Appellee. On September 29, 2023, service of the *Amicus Curiae* Brief will be accomplished electronically through the filing manager, Odyssey EfileIL, to the following counsel of record:

SEE ATTACHED SERVICE LIST

Within five days of acceptance by the Court, the undersigned states that 13 paper copies of the Brief bearing the court's file-stamp will be sent to the above court.

/s/ Dominic C. LoVerde
 Dominic C. LoVerde

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

/s/ Dominic C. LoVerde
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