

G R e v i e w

ILLINOIS PASSES LAW REQUIRING NOTICE OF LAYOFFS AND PLANT CLOSINGS

By David N. Michael

Governor Blagojevich recently signed the Illinois Worker Adjustment and Retraining Notification Act, requiring Illinois employers with 75 or more employees to give 60 days' notice to employees and local officials before any covered mass layoff or plant closing. Although the Illinois WARN Act is based on the federal WARN Act, the Illinois WARN Act applies to smaller employers and requires notice of smaller layoffs. The new law goes into effect on January 1, 2005.

Smaller Employers Covered by Illinois WARN Act

While the federal WARN Act only applies to employers with 100 or more non part-time employees, the Illinois WARN act applies to employers with 75 or more non part-time employees (a part-time employee is an employee who works under 20 hours per week on average, or is employed for fewer than 6 of the 12 months immediately preceding the date on which notice of a layoff or closing would be required.)

Smaller Layoffs Trigger 60-Day Notice Requirement Under Illinois WARN

Both the federal and Illinois WARN Acts require 60 days' notice of mass layoffs and

plant closings. However, the Illinois WARN Act requires employers to give notice of smaller layoffs that would *not* trigger the notice requirement of the federal WARN Act. The federal WARN Act only requires employers to give notice of layoffs that affect (1) at least 50 non-part-time employees if the affected employees constitute 33% or more of the non part-time employees at a single site of employment, or (2) at least 500 non-part-time employees at a single site (regardless of whether the affected employees amount to 33% of the work force). The Illinois WARN Act, on the other hand, requires employers to give notice of layoffs that affect (1) at least 25 if the affected employees constitute 33% or more of the non part-time employees at a single site, or (2) at least 250 non-part-time employees (regardless of whether the affected employees amount to 33% of the work force). So, for example, an employer who lays off 40 full-time employees out of 110 would not need to give notice under the federal WARN Act but would need to give notice of the layoff under the Illinois WARN Act. Furthermore, an employer who lays off 300 out of 1000 employees would not need to give notice under the federal WARN Act but would need to give notice of the layoff under the Illinois WARN Act.

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A Newsletter from
the Law Firm

GOULD & RATNER

The GReview is published by the law firm of Gould & Ratner to update clients and friends on legal trends and developments of interest. The material contained in this newsletter is only a synopsis of recent cases and legislative developments and is not legal advice. If you have a question or an individual claim involving a topic covered in this newsletter, you should seek a legal opinion based on the law as a whole and the facts of your particular case. Professional rules in some jurisdictions may treat the GReview as advertising.

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Note, the Illinois WARN Act technically states that sixty days' notice is required for any "mass layoff, relocation, or employment loss." This word choice appears to be in error because it would require notice of any not-for-cause termination (which would be considered an "employment loss") but not notice of a plant closing. Similarly, the word "relocation" is not otherwise defined in the Act. Gould & Ratner spoke with representatives of Illinois Senator Carol Ronen (who sponsored the bill) and the Illinois Department of Labor and they have said that they believe the Act is intended to require notice for mass layoffs and plant closings as defined in the Act, but not any smaller layoffs.

Employers Must Notify Employees Directly Under Illinois WARN

Both the federal and Illinois WARN Acts require employers to give written notice to government officials and employee representatives, such as union officials, before any mass layoff or plant closing. The Illinois WARN Act also requires employers to notify all affected employees directly, whereas the federal WARN Act only requires direct employee notification if the affected employees have no official labor representative.

Unforeseeable Layoffs Require Notice Under Illinois WARN

Under the federal WARN act, an employer does not have to give 60 days' notice of a mass layoff or plant closing caused by business conditions that were not foreseeable 60 days prior to the closing or layoff. However, the Illinois WARN Act only extends this exception to plant closings. So, an employer must give notice of a mass layoff 60 days prior to the layoff, even if the business conditions that cause the layoff are not foreseeable 60 days before the proposed layoff.

The Illinois Department of Labor will likely issue regulations interpreting the Illinois WARN Act. We will provide further details at that time. In the meantime, if you have any questions regarding this new law, please do not hesitate to contact David N. Michael at 312-236-3003 or dmichael@gouldratner.com.

FEDERAL JURISDICTION OVER ADJACENT WETLANDS STILL MUDDY

By Karin T. O'Connell and Shannon L. Clark

Whether wetlands on a landowner's property may be developed without a permit from the U.S. Army Corps of Engineers depends, in large part, upon whether those wetlands are "jurisdictional"; i.e., whether they fall within the definition of "waters of the United States" as that term is defined under the federal Clean Water Act and regulations promulgated thereunder.

The scope of federal wetlands jurisdiction under the Clean Water Act has remained a moving target in the three years following the United States Supreme Court's ruling in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001) ("SWANCC"). In SWANCC, the Supreme Court invalidated Clean Water Act jurisdiction over isolated, intrastate, non-navigable wetlands. However, the opinion created more ambiguity than it sought to address, primarily because it failed to clarify the distinction between isolated and "adjacent" wetlands; that is, wetlands adjacent to navigable waters, which would be considered jurisdictional. Court opinions since SWANCC are inconsistent and leave landowners with little guidance.

For example, in a recent case from Michigan, a landowner was found criminally liable for filling wetlands on his property which he contended were not adjacent wetlands. *United States v. Rapanos*, 376 F. 3d 629, 635 (6th Cir. 2004). John Rapanos was convicted of illegally discharging fill material into wetlands which were 11 to 20 miles from the nearest navigable-in-fact water, but were connected to a man-made drain which flowed into a creek; the creek flowed into a river which was navigable; and the river eventually flowed into Saginaw Bay and Lake Huron. Rapanos refused to obtain a Section 404 permit from the Corps, which would have permitted him to develop the wetlands, and proceeded with development in defiance of the Corps' assertion of jurisdiction. On appeal, the Sixth Circuit noted that "[d]etermining which wetlands are considered "adjacent to" traditional navigable waters or their tributaries has proved to be a complication in defining [Clean Water Act] jurisdiction." *Rapanos*, 376 F. 3d at 635. The court went on to uphold the conviction on the basis that "[a]ny contamination of the Rapanos wetlands could affect the Drain, which, in turn could affect navigable-in-fact waters. Therefore, the protection of the wetlands on Rapanos's land is a fair extension of the Clean Water Act." *United States v. Rapanos*, 339 F. 3d 447, 453 (6th Cir. 2003).

While a majority of cases hold that SWANCC applies only to waters that are intrastate, isolated, and non-navigable, and thus would consider all other waters to be jurisdictional as the Sixth Circuit did in *Rapanos*, a minority of courts have interpreted SWANCC's reasoning to also apply to indirectly adjacent wetlands. *Joint EPA/Corps Guidance Memorandum*, 68 FR 1991, 1996 (2003); see also *In re Needham*, 354 F. 3d 340, 345-46 (5th Cir. 2003) (water must be "truly adjacent to navigable waters," or at least have a "significant measure of proximity" to navigable waters), *FD&P Enterprises, Inc. v. U.S. Army Corps of Engineers*, 239 F. Supp. 2d 509, 516 (D. N.J. 2003).

In response to this jurisdictional quagmire, in January 2003, the EPA and Corp of Engineers initiated rulemaking to clarify and limit federal wetlands jurisdiction. However, the proposed rulemaking efforts met with extensive objection, mostly from state regulators who felt they would have insufficient means to regulate wetlands which would become non-jurisdictional under federal law, and the rulemaking was shelved.

On July 15, 2004, Representative Richard H. Baker (R-La) introduced the Federal Wetlands Jurisdiction Act of 2004. The FWJA seeks to clarify federal wetlands jurisdiction by eliminating jurisdiction over "adjacent" wetlands that do not physically touch naturally occurring, navigable-in-fact waters. It also seeks to streamline the costly and lengthy process to obtain a Section 404 permit from the Corps. The House has not voted on the bill, and, in light of the failed rulemaking, its passage is highly uncertain.

In short, the hydrological properties and geographic proximity necessary for adjacency jurisdiction remain unclear. Landowners, therefore, will continue to have little guidance in deciding whether to develop private wetland areas, over which the Corps has asserted jurisdiction, without a Section 404 permit. And, as the *Rapanos* case illustrates, landowners who proceed to develop wetland areas and lose their jurisdictional challenge, face both criminal and civil penalties for doing so.

If you would like further information concerning this issue, please contact Karin O'Connell at 312/899-1616 (kcoconnell@gouldratner.com) or Shannon Clark at 312/899-1632 (sclark@gouldratner.com).

THE ILLINOIS CONSUMER FRAUD ACT – A POTENTIAL WEAPON THAT BUSINESSES CAN UTILIZE TO COMBAT MISREPRESENTATION, CONCEALMENT, UNFAIR OR DECEPTIVE PRACTICES

By Mark Abraham

Disputes between businesses sometimes result in the termination of a contract and litigation. Illinois law provides a powerful tool that every business contemplating litigation should be aware of in situations where misrepresentation, concealment, or deceptive practices are suspected or known to exist. While a common law fraud claim is the typical theory upon which fraud claims are generally pursued, it is important to be familiar with the Illinois Consumer Fraud Act (the "ICFA" or this "Act"). The ICFA is a statute specifically designed to protect consumers, borrowers and businesses against fraud, unfair methods of competition, and other unfair or deceptive business practices.

At first blush, one might think that the ICFA is not applicable to commercial entities that deal solely with other sophisticated businesses. This is not necessarily the case. While the ICFA is regularly employed as a tool by the plaintiff's bar to pursue claims on behalf of disgruntled consumers, a business entity can also utilize this statute in a variety of contexts. Whether you are involved in the technology, telecommunications or manufacturing industries, or the real estate field, your ability to identify issues surrounding potential ICFA claims will assist you in protecting your business assets as well as in knowing when your business can seek affirmative relief under this Act. The advantages of the ICFA are: (1) the burden of proof and statutory requirements are less stringent than under common law fraud, (2) the potential for recovery is increased due to the broad range of allowable damages, and (3) courts have creatively allowed recovery under a variety of circumstances. Therefore, in the right situation, a business entity can aggressively use the ICFA as a sword to fight fraud, unfair methods of competition, and misrepresentation. *It is equally, if not more important, for businesses to familiarize themselves with the ICFA to shield themselves from potential liability arising under this Act.*

DO BUSINESSES HAVE STANDING UNDER THE ICFA?

Before turning to the elements needed to substantiate an ICFA claim, the question arises whether businesses have standing to sue other businesses under the ICFA. Although the ICFA is principally concerned with protecting consumers, businesses may very well have standing to bring an ICFA action under certain circumstances. There are two circumstances under which a business will generally have standing to sue another business under the ICFA. The first is where a business is a

consumer of another company's product. Under the ICFA, a consumer is defined as "any person who purchases or contracts for purchase of merchandise not for resale in the ordinary course of his trade or business but for his use or that of a member of his household."

Generally speaking, a business may be able to recover pursuant to this Act when it can demonstrate that it purchased goods or services in a manner typical of a consumer and suffered a similar type of injury. Any company that provides goods or services to another company for the other company's own consumption or use is a potential defendant under the ICFA. For example, a construction company that purchased insurance was deemed to have standing to sue its insurer under the ICFA. A company that licensed software from a vendor had standing as a consumer under the ICFA where it alleged that it was fraudulently induced to enter into the software contract. A buyer of a commercial press was found to have standing under the ICFA where it alleged false statements regarding material facts concerning past problems with the press. Keep in mind that a business may lack standing under the ICFA if it purchased the goods for resale, but it may be able to rely on a theory of common law fraud or a remedy under the Uniform Commercial Code.

In the second circumstance involving businesses, it may be more difficult (but not impossible) for a business to obtain standing. *The proper test in this second scenario is whether the alleged conduct meets the "consumer nexus test."* When an ICFA claim is based upon a breach of contract, a party must allege a sufficient nexus between the complained of conduct and consumer protection concerns. Illinois Courts have exercised broad discretion in identifying "consumer protection concerns." Consumer protection concerns were deemed to be implicated when an allegedly deceptive brochure from an automobile dealer was distributed to thousands of consumers. They were also deemed present in a case where the business plaintiff alleged that a business practice caused financial injury to other consumers, even though these consumers were not a part of the lawsuit. Similarly, a pharmacy was deemed to possess standing to sue another pharmacy and a nursing home under the ICFA, based upon an allegation that the defendants were engaged in a kickback scheme that caused the nursing home residents to pay higher prices for their prescriptions. The bottom line is that in a situation where the plaintiff-business is not a consumer of the defendant's goods or services, the plaintiff must plead specific factual allegations that establish a

GOULD & RATNER ATTORNEYS IN THE SPOTLIGHT



Chris Horvay, Chair of Gould & Ratner's Creditors' Rights and Bankruptcy Group, was recently appointed to the Board of Visitors of the College of Arts & Sciences at Syracuse University. His appointment is for a two year term. Chris is a 1973 graduate of the College, where he graduated magna cum laude, with Honors in History. Chris' son, Matt, is presently a sophomore in the College.

In other news, Chris was recently named the Turnaround Management Association's Educator of the Year. Chris was honored at the Senior Executive Forum, held on October 20.

Chris has been an active member in TMA since 1991 and has held numerous local, regional, and international leadership positions with the organization. If you would like to learn more about the Turnaround Management Association, please contact Chris at 312/899-1624 or at chorvay@gouldratner.com.

¹The ICFA defines a “person” as any natural person or his legal representative, partnership, corporation (domestic and foreign), company, trust, business entity or association, and any agent, employee, salesman, partner, officer, director, member, stockholder, associate, or trustee. Merchandise is broadly defined as including “any objects, wares, goods, commodities, intangibles, real estate situated outside of the State of Illinois, or services.” Moreover, the Act applies to any “trade or commerce” which includes “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.”

²This article does not address what types of acts constitute an unfair method of competition or purport to identify all unfair or deceptive business practices.

³Interestingly, a few courts have allowed a limitation of remedy provision to prevent recovery of damages under the Illinois Consumer Fraud Act in certain cases. Therefore, it is essential to consider including provisions limiting consequential damages in every contract, regardless of the size of the transaction.

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clear connection to specific consumers or trade practices addressed to the consumer market generally. A plaintiff-business that cannot establish the existence of consumer protection concerns can always fall back on a theory of common law fraud.

WHAT IS PROHIBITED UNDER THE ICFA

The ICFA provides that the following conduct is unlawful:

[u]nfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use or employment of any deception, fraud, false pretense, false promise, misrepresentation, or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact... in the conduct of any trade or commerce.

Thus, under the Act, a plaintiff needs to establish the following:

- (1) a deceptive act or practice by the defendant;
- (2) the defendant's intent that the plaintiff rely on the act or statement;
- (3) the deception occurred in the course of conduct involving trade or commerce;
- (4) actual damage to the plaintiff;
- (5) proximately caused by the deception.

Unlike common law fraud, a plaintiff does not have to prove that the defendant acted in bad faith or even intended to deceive the plaintiff. Even an innocent misrepresentation may be actionable under the ICFA. The plaintiff also does not have to prove that the plaintiff actually relied on the deception or that the plaintiff exercised diligence in ascertaining the accuracy of the misstatements. Of course, the misrepresentation or misstatement must be of a material fact. An omission or concealment of a material fact in the conduct of trade or commerce constitutes consumer fraud. A material fact exists where a buyer would have acted differently knowing the information, or if it concerned the type of information upon which a buyer would be expected to rely in making a decision whether to purchase. Furthermore, under the ICFA it is unnecessary to plead a common law duty to disclose in order to state a valid claim based on an omission or concealment.

The ICFA also prohibits trade practices that are unfair, as well as deceptive. If the conduct

is found to be unfair, proof or allegation of deception is not required. The factors to be considered in determining whether the conduct in question is unfair are as follows: (1) whether the practice offends public policy; (2) whether it is immoral, unethical, oppressive or unscrupulous; or (3) whether it causes substantial injury to consumers. These factors do not all have to be satisfied. The test is the degree to which the facts of a case substantially meet one of the criteria or meet all the criteria, though to a lesser degree. Only the most egregious of facts will likely meet these standards.

The burden of proof for an ICFA claim is based merely upon a “preponderance of the evidence” as contrasted with the more stringent “clear and convincing” standard for common law fraud. Fraud under the ICFA must still be pled with specificity. A successful plaintiff may be awarded (1) economic damages; (2) injunctive relief; (3) punitive damages; (4) reasonable attorney's fees, (5) court costs; and (6) any other relief which the Court deems proper. A prevailing defendant may also recover reasonable attorney's fees. No right to a jury trial exists under the ICFA. Additionally, the ICFA requires that a plaintiff send a copy of the complaint to the Illinois Attorney General. The ICFA confers upon the Attorney General the power to investigate alleged violations of the Act and to prosecute offenders, pursuing injunctive relief, restitution and civil penalties.

It is important to remember a lawsuit based on the ICFA must be brought within three years after the cause of action accrued, although the statute may be tolled. In certain circumstances, and if properly pled, an action for fraudulent concealment may be brought within five years of the discovery of the cause of action.

CONCLUSION

It is not every day that a business will discover the existence of fraud, concealment, or deceptive business practices. However, in today's competitive market, one sees more of this than one would like. The ability to identify these issues and understand the possible ramifications can serve to effectively position a business in asserting its rights under the ICFA as well as defend itself against an over-zealous plaintiff.

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