

**THE GENERAL SCOPE AND ELEMENTS OF
ILLINOIS CONSUMER FRAUD STATUTES**

Prepared for the Product Liability Advisory Council
October 2004

ILLINOIS

**Stephanie A. Scharf
Jenner & Block LLP
One IBM Plaza
Chicago, Illinois 60611-7603
312-923-2884
sscharf@jenner.com**

ILLINOIS

Stephanie A. Scharf
Jenner & Block LLP
One IBM Plaza
Chicago, Illinois 60611-7603
312-923-2884
sscharf@jenner.com

I. The General Contours of Illinois Consumer Fraud Statutes.

Illinois has two general consumer fraud statutes: the Illinois Consumer Fraud and Deceptive Business Practices Act (“ICFA”), 815 ILCS 505/1 *et. seq.*, and the Uniform Deceptive Trade Practices Act (“UDTPA”), 815 ILCS 510/1 *et. seq.* Illinois has enacted a number of other more specific consumer protection acts but because they are less oriented to consumer products, they are not the subject of this chapter. Such statutes include, as examples, the Home Repair Fraud Act, 815 ILCS 515; Pay-Per-Call Services Consumer Protection Act, 815 ILCS 520; Job Referral and Job Listing Services Consumer Protection Act, 815 ILCS 630; Motor Vehicle Leasing Act, 815 ILCS 636, among others.

II. The Illinois Consumer Fraud and Deceptive Business Practices Act.

Scope. Enacted in 1961, the aim of the ICFA is protecting consumers against fraud and unfair or deceptive acts in the conduct of trade or commerce. 815 ILCS 505/2; *Scott v. Association for Childbirth at Home, Int’l.*, 88 Ill.2d 279 (1981); *Oliveira v. Amoco Oil Co.*, 201 Ill.2d 134 (2002). Unlawful practices under the ICFA are defined broadly as

Unfair 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, or the use of employment of any practice described in the [UDTPA, 815 ILCS 510/2] in the conduct of any trade or commerce.

§505/2. Amendments to section 505/2 specify some additional unlawful practices such as conduct around credit applications (505/2C); resale (505/2G); use of coupons in consumer sales (505/2J.1); offers of free prizes (505/2P); to name just a few.

Illinois decisions regarding claims under ICFA involve a wide array of goods and services. *See, e.g., Avery v. State Farm Mut. Auto Ins. Co.*, 321 Ill.App.3d 269

(5th Dist. 2001) (used auto parts); *Oliveira v. Amoco Oil*, 201 Ill.2d 134 (2002) (gasoline); *Randazzo v. Harris Bank Palatine, N.A.*, 104 F. Supp. 2d 949 (N.D. Ill 2000), aff'd 262 F.3d 663 (banking services); *Leona's Pizzeria, Inc. v. Northwestern National Cas. Co.*, 203 F. Supp. 2d 930 (N.D. Ill 2002) (sale of insurance); *Household Commodities Inc. v. McCarty*, 513 F. Supp. 311 (N.D. Ill 1979) (purchase of investment services and commodities); *Mann v. Kemper Financial Companies, Inc.*, 247 Ill.App.3d 966 (First Dist. 1992) (investors who purchased interest in public mutual funds); *Randels v. Best Real Estate, Inc.*, 243 Ill.App.3d 801 (Second Dist. 1993) (prospective purchaser of real estate); *People ex rel. Daley v. Datacom Systems Corp.*, 146 Ill.2d 1 (1992)(debt collection agency hired to pursue delinquent parking tickets may be sued for alleged misrepresentations to ticket holders); *Peterson v. Allstate Insurance Co.*, 171 Ill.App.3d 909 (First Dist. 1998) (purchase of insurance). Not surprisingly, motor vehicle sales and leases have been the subject of numerous ICFA actions. Examples include *Garcia v. Overland Bond Inv. Corp.*, 282 Ill.App.3d 486 (First Dist. 1996) (down payments, used car warranties); *Abt v. Mazda American Credit*, 25 F. Supp. 2d 860 (N.D. Ill 1998) (term in auto lease agreement); *Williams v. Ford Motor Co.*, 990 F. Supp. 551 (N.D. Ill 1997) (cost of extended service plan).

Efforts have been made from time to time to amend the statute. The last such amendments provided favorable substantive and procedural requirements for claims against new and used vehicle dealers, but the amendments were struck down by the Illinois Supreme Court as unconstitutional "special legislation." *Allen v. Woodfield Chevrolet, Inc.*, 208 Ill.2d 12 (Ill. 2003) (striking provisions allowing offer-of-judgment procedures limiting circumstances for awarding punitive damages, making proof of a "public injury" a required pleading element, and requiring a 30-day written notice).

ICFA complaints premised on fraud are subject to the same particularity and specificity rules as claims for common law fraud, *McGuire v. Ameritech Cellular Corp.*, 314 Ill.App.3d 83 (First Dist. 2000), although there is authority for the proposition that ICFA claims involving unfair business practice, rather than fraud, do not require pleading with particularity. *Strohmaier v. Yemm Chevrolet*, 211 F. Supp. 2d 1036 (N.D. Ill 2001).

Enforcement. The ICFA provides the Illinois Attorney General with broad powers of investigation and enforcement. Sections 505/3-6 detail the State's powers to investigate, require a defendant to file written statements or a report made under oath, take discovery, issue subpoenas, conduct hearings and promulgate rules with the force of law. A failure to file a requested statement or report, or obey a subpoena, subjects the defendant to harsh penalties, including a court order restraining sale or advertisement of any merchandise and suspending the corporate charter or revoking the authority to do business in Illinois. 815 ILCS 505/6.

The statute also allows private causes of action. 815 ILCS 505/10(a)(a). To show a violation, a private plaintiff must establish (1) a deceptive act or practice, (2)

intent on the defendant's part that the plaintiff rely on the deception, and (3) the deception occurred in the course of trade or commerce, (4) "actual damage" to the plaintiff, which (5) was proximately caused by the deception. *Id.*; *Zekman v. Direct American Marketers, Inc.*, 182 Ill.2d 359 (1998); *Oliveira*, 201 Ill.2d at 148-49; *Cozzi Iron & Metal Inc. v. U.S. Office Equipment, & Metal Inc. v. U.S. Office Equipment, Inc.*, 250 F.3d 570 (7th Cir. 2001). A defendant need not have intended to deceive, it is enough if the defendant intended to induce reliance on the misinformation. *Cuculich v. Thomson Consumer Electronics, Inc.*, 317 Ill.App.3d 709 (First Dist. 2000).

The Illinois Supreme Court has recently clarified that a plaintiff asserting a claim under ICFA for deception must allege and prove that he was personally deceived or misled by the defendant's actions. *Oliveira*, 201 Ill.2d at 155. A consumer's failure to allege and establish the proximate cause element, including that the consumer had seen or heard the advertisement complained about, and was deceived by it, requires dismissal of the claim. *Id.* Alleging only a "market theory," that prices were inflated by consumer demand based on deceptive advertising, is not enough to state a claim. *Id.* In the same context, the issue of reliance is subsumed by a proximate causation analysis.

The burden of proof for an ICFA claim is by a preponderance of the evidence. *Avery v. State Farm Mut. Auto Ins. Co.*, 321 Ill.App.3d 269 (5th Dist. 2001); *Cuculich*, 317 Ill.App.3d at 719 (application of "clear and convincing" standard was reversible error).

Non-Illinois Consumers. One of the open issues under the ICFA is whether the statute applies to plaintiffs or conduct occurring outside of Illinois, a position pushed hard in recent years by the consumer fraud plaintiff's bar. Newer cases have brought the issue front and center, although the law, as this chapter is being written, is not fully settled.

In 2000, the Illinois appellate court deciding *Oliveira v. Amoco Oil*, 311 Ill.App.3d 886 (Fourth Dist. 2000), affirmed the trial court's holding that the ICFA could not protect out-of-state consumers or business conducted outside of Illinois. *Oliveira* involved a putative class action over alleged false advertising against an oil company that was headquartered in Illinois and also allegedly designed the false advertising campaign in Illinois. When *Oliveira* reached the Illinois Supreme Court, however, the decision changed course. First, the Court held that a claim under ICFA required allegations that the named plaintiffs read the advertisement and were deceived by it in the purchase of gasoline from the defendant. Because the *Oliveira* complaint failed to make such allegations, it was dismissed. The Supreme Court declined to reach the issues of class certification and specifically whether the ICFA extended to non-Illinois consumers. Instead, those portions of the circuit and appellate court decisions were vacated. 201 Ill.2d at 157.

Avery v. State Farm Mutual Ins. Co., 321 Ill.App.3d 269 (Fifth Dist. 2001), *appeal allowed*, 201 Ill.2d 560 (2002), certified a “nationwide class” against an automobile insurer over car replacement parts that were allegedly misrepresented to be of “like kind and quality” as the original parts. The *Avery* court reasoned that the ICFA on its face does not limit application to resident consumers and where “deceptive acts and practices were perpetrated in Illinois,” non-Illinois consumers have proceeded with ICFA claims. 321 Ill.App.3d at 281, *citing Martin v. Heinold Commodities, Inc.*, 117 Ill.2d 67 (1987). Also of significance was that the defendant was headquartered in Illinois and there was “substantial evidence the deceptive claims practices were designed, established, and initiated” from Illinois. *Id.* at 282. The case is pending review before the Illinois Supreme Court.

In *Clark v. TAP Pharmaceuticals*, 343 Ill.App.3d 538 (Fifth Dist. 2003), the court determined that the ICFA may apply to claims brought by a nationwide class alleging that members were overcharged for a prescription anti-cancer medicine. The *Clark* court looked to its own earlier ruling in *Avery*, 321 Ill.App.3d at 282-83, including rationales for why a nationwide class was appropriate. “The injury to the plaintiffs, in paying the inflated cost of Lupron, occurred throughout the country, including Illinois. The conduct leading to the injury occurred in Illinois, *i.e.*, the defendants’ marketing and sales agents, located in the defendants’ principal places of business in Illinois, concocted the fraudulent scheme to inflate the price of Lupron. Although the plaintiffs are domiciled throughout the country, the defendants’ principal places of business are in Illinois, abrogating the need to apply the laws of all 50 states to these claims and rendering irrelevant the defendants’ argument that state law variances in the present case defeat the predominance of the common issues of fact and law.” *Id.* at 546.

In the same vein, the appellate court in *P.J.’s Concrete Pumping Service, Inc., v. Nextel West Corp.* 345 Ill. App. 3d 992 (Second Dist. 2004), *appeal denied*, 209 Ill. 2d 584 (2004), affirmed certification of a class of cell phone company customers who alleged that the company violated the ICFA by collecting taxes on behalf of municipalities from customers located in unincorporated areas. Giving *Oliveira* a narrow, highly technical reading, the appellate court held that *Oliveira* did not change the pleading requirements for misrepresentation claims in a class action suit and that actual deception by each individual class member was not required to be pleaded. *Id.* at 1002. The court was satisfied that the allegations involve “a uniform billing practice” that has “at least the potential to deceive customers.” *Id.* The court allowed the class to include members who reside outside of Illinois, citing the *Avery* and *Clark* decisions.

Other recent cases skirt the issue of a nationwide class. *Wafra Leasing Corp. 1999-A-1 v. Prime Capital Corp.*, 204 F. Supp. 2d 1120 (N.D. Ill 2002), decided before the Supreme Court’s decision in *Oliveira*, also addressed whether the ICFA applies to consumers or business outside of Illinois. Although the plaintiff business -- suing over a bad investment in a securitization of financial contracts -- was not an Illinois

citizen, it was a “consumer of Illinois products and services, and thus has standing to sue under the Act.” *Id.* at 1123. The trial court in *Price v. Philip Morris, Inc.*, No. 00-L-112, Circuit Court of Madison County, certified under the ICFA a class of all persons who purchased the company’s “Light” cigarettes in Illinois for personal consumption. The case is now on direct appeal to the Illinois Supreme Court.

Standing to Sue. The statute provides redress for “consumers,” i.e., “any person who purchases or contracts for the 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.” 815 ILCS 505/1(e). Any natural person or business may be a consumer. *Id.* at 505/1(c). Businesses may have standing to sue under the ICFA if the alleged misconduct meets the “consumer nexus test,” i.e., involves trade practices directed to the market generally or otherwise implicates concerns for consumer protection. *Pain Prevention Lab, Inc. v. Elec. Waveform Labs, Inc.*, 657 F. Supp. 1486 (N.D. Ill. 1987). *Compare Banco del Estado v. Navistar International Transport Corp.*, 942 F. Supp. 1176 (N.D. Ill. 1996) (delivery of nonconforming goods in letter of credit transaction did not involve trade practices addressed to the market generally or consumer protection concerns); *3 Com Corp. v. Electric Recovery Specialists, Inc.*, 104 F. Supp. 2d 932, 939 (N.D. Ill. 2000) (contractual relationship between parties had no meaningful impact on consumer protection concerns). Competing businesses must establish by clear and convincing evidence how their allegations implicate consumer concerns, to have standing to use under the ICFA. *Speakers of Sport, Inc. v. ProServ, Inc.*, 178 F.3d 862 (7th Cir. 1999).

Not every purchase, however, is a “consumer” transaction. *See, e.g., Gelco Corp. v. Major Chevrolet, Inc.*, 2002 WL 31427027 (N.D. Ill. 2002) (lenders under lease and retail financing arranged with automobile dealer were not consumers for purposes of an ICFA claim, nor could they allege a “consumer nexus”); *3 Com Corp. v. Electronics Recovery Specialists*, 104 F. Supp. 2d 932 (N.D. Ill. 2000) (seller of scrap metal in commercial context could not file an ICFA claim); *Brown v. Veile*, 198 Ill.App.3d 513 (Fifth Dist. 1990) (dealer in used mobile homes were not consumers under the ICFA); *Speakers of Sport, Inc. v. Pro Serv, Inc.*, 178 F.3d 862 (7th Cir. 1999) (sports agency had no standing to sue competitor under ICFA because no consumer protection concerns were implicated). The decisions turn on whether merchandise or services are purchased for personal/household use, not use in trade or business. 815 ILCS 505/1(e).

Certain professional services also fall outside the statute. *See, e.g., Feldstein v. Guinan*, 148 Ill.App.3d 610 (First Dist. 1986) (medical resident could not state ICFA claim for alleged breach of residency contract; practice of medicine not ordinary trade or commerce); *Steinberg v. Chicago Medical School*, 69 Ill.2d 320 (Ill. 1977) (applicant to medical school not a consumer under ICFA); *Cripe v. Leiter*, 184 Ill.2d 185 (1998) (ICFA does not apply legal services or an attorney’s billing for legal services).

Remedies. ICFA remedies run the gamut. Section 505/7 provides for preliminary or permanent injunctive relief; revocation of licenses; dissolution or suspension of corporations; restitution §505/7(a); and civil penalties paid to the State in a sum not to exceed \$50,000 per violation, §505/7(b). Violations against the elderly may lead to additional monetary penalties, with the proceeds used in part to investigate and prosecute other frauds. §505/7(c). Records, property and other assets may be seized and sold under court direction. §505/8.

The greatest impact of the ICFA stems from remedies for money damages. The court may award actual economic damages or “any other relief which the court deems proper” upon proof of a violation, including punitive damages. §505/10a. Recovery for attorneys fees and costs may be sought and obtained by the prevailing party, plaintiff or defendant. §505/10a(c). *See, e.g., S Industries, Inc. v. Diamond Multimedia Systems, Inc.*, 17 F. Supp.2d 775, 777 (1998) (award over \$200,000 in attorneys fees to the defendant). Fees may be awarded to a prevailing ICFA defendant if the basis for the plaintiff’s suit and/or his means of prosecuting it can fairly be regarded as “oppressive,” i.e., “malicious, fraudulent, deliberate, or willful.” *Id.* *See also, e.g., Allergy Asthma Technology, Ltd. v. I Can Breathe, Inc.*, 195 F.Supp.2d 1059, 1073 (N.D. Ill. 2002) (Plaintiff’s conduct of the litigation and its “motivations for attempting to convert a problem of its own making into a lawsuit asserting multiple claims despite minor potential damages even if it were successful justify characterizing this as an ‘oppressive suit’ on its part within the meaning of *Door Sys., Inc. v. Pro-Line Door Sys., Inc.*, 126 F.3d 1028, 1032 (7th Cir.1997).”).

Punitive damages, while disfavored, also are recoverable where the alleged 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. *Martin v. Heinold Commodities*, 163 Ill.2d 33 (Ill. 1994); *Malooley v. Alice*, 251 Ill.App.3d 51 156 (Third Dist. 1993).

A contract provision may serve to limit remedies and may even sustain dismissal of an ICFA claim. *See, e.g., Stepan v. Winter Panel Corp.*, 948 F.Supp. 802 (N.D. Ill. 1996) (“the limitation of remedies provision specifically provides ‘[i]f the product does not conform to the warranties set forth in this section, or if Buyer makes any other claim of any sort whatsoever against Seller, Buyer’s exclusive remedy shall be limited to replacement of the product ...’ and further, specifically limits the Seller’s liability for any consequential damages. Therefore, the clause is sufficiently broad and specific to prohibit the Defendant from collecting the damages sought under its Consumer Fraud Act count and the Plaintiff’s motion to dismiss this count would be appropriately granted on this basis as well.”); *Lefebvre Intergraphics, Inc. v. Sanden Machine Limited*, 946 F. Supp. 1358 (N.D. Ill. 1996) (holding that a contractual consequential damages exclusion prevented the plaintiff from recovering such damages under the ICFA).

Exemptions. The ICFA has a number of exemptions relevant to product manufacturer defendants. Section 10(b)(1) exempts actions or transactions “specifically authorized by laws administered by any regulatory body or officer acting under statutory authority of this State or the United States.” This part of the statute is often the focus of claims against manufacturers of regulated products, such as drugs, securities, vehicles and food. As noted in a recent Seventh Circuit decision, the case law interpreting this exemption is not entirely clear. *See, Bober v. Glaxo Wellcome PLC*, 246 F.3d 934 (7th Cir. 2001). Contrasting cases cited in *Bober* include *Weatherman v. Gary-Wheaton Bank of Fox Valley, N.A.*, 186 Ill.2d 472 (1999); *Lanier v. Assocs. Fin., Inc.*, 114 Ill.2d 1, 101 (1986); *Jackson v. South Holland Dodge, Inc.*, 312 Ill.App.3d 158 (2000); *Mario’s Butcher Shop & Food Ctr., Inc. v. Armour & Co.*, 574 F.Supp. 653, 655-56 (N.D. Ill. 1983); *Martin v. Heinold Commodities, Inc.*, 163 Ill.2d 33 (1994); *Pawlikowski v. Toyota Motor Credit Corp.*, 309 Ill.App.3d 550 (Ill. App. Ct. 1999), *appeal denied*, 188 Ill.2d 567 (2000); *Heastie v. Cmty. Bank of Greater Peoria*, 690 F.Supp. 716, 720-21 (N.D. Ill. 1988); *Robinson v. Toyota Motor Credit Corp.*, 315 Ill.App.3d 1086 (2000).¹

The *Bober* court sought to harmonize these various decisions by looking especially at *Weatherman* and *Martin*:

Taken together, the cases stand for the proposition that the state CFA will not impose higher disclosure requirements on parties than those that are sufficient to satisfy federal regulations. If the parties are doing something specifically authorized by federal law, section 10b(1) will protect them from liability under the CFA. On the other hand, the CFA exemption is not available for statements that manage to be in technical compliance with federal regulations, but which are so misleading or deceptive in context that federal law itself might not regard them as adequate.

Id. at 940. *Bober*, which involves the marketing of pharmaceutical products, dismissed the ICFA claims because statements indicating that two drugs were not the same medications fell within the exemption for actions specifically authorized by federal law

Also exempted from ICFA’s reach are actions covered by trademark laws; advertising involving the media; and certain other limited exemptions not involving products. §505/10b(4-6).

Statute of Limitations. Section 505/10a(e) imposes a three year limitations period: any ICFA action must be brought within three years after the cause of

¹ Since *Bober*, the Illinois Supreme Court reviewed the *Robinson* case, 201 Ill.2d 403 (2002), and dismissed all claims under ICFA.

action accrued. Defendants should expect a discovery rule to apply. *E.g., Highsmith v. Chrysler Credit Corp.*, 18 F. 3d 434 (7th Cir. 1994) (ICFA cause of action accrues when plaintiff knows or reasonably should know of his injury and that it was wrongfully caused).

No Right to a Jury Trial. A cause of action under the ICFA does not provide the right to a jury trial, as explained in *Martin v. Heinold Commodities, Inc.*, 163 Ill. 2d 33 (1994), because the ICFA is a statutory proceeding unknown to common law. While some litigants may view a bench trial as more favorable to defendants, recent cases have demonstrated that very large judgments may be awarded by a trial court, even in instances where the legal basis for such judgments can readily be questioned. *See, e.g., Price v. Philip Morris Inc.*, No. 00-L-112, Circuit Court of Madison County (\$10.1 billion judgment against Philip Morris USA Inc. for compensatory and punitive damages related to the sale of “light” cigarettes).

III. The Illinois Uniform Deceptive Trade Practice Act.

Scope and Standing. The UDTPA, 815 ILCS §§ 510/1 *et. seq.*, enacted in 1966, codifies the common law tort of unfair competition and generally applies where one competitor is harmed or may be harmed by the unfair trade practices of another. Unlike the ICFA, whose mission is to protect consumers, the UDTPA focuses on discouraging unfair competition. *Popp v. Cash Station, Inc.*, 244 Ill. App. 3d 87, 93 (First Dist. 1992).

The statute generally prohibits a person from engaging in deceptive conduct that “creates a likelihood of confusion or misunderstanding” “in the course of his or her business vocation or occupation.” *Id.* at 510/2. *Compare Bentley v. Slavik*, 663 F. Supp. 736 (S.D. Ill 1987) (buyer of violin could not recover against seller for alleged deception when seller was not in the business of selling violins). Wrongful conduct includes “passing off,” likelihood of confusion as to source, deceptive misdescription or misrepresentation, disparagement by a competitor, “bait” advertising or similar anticompetitive misconduct. *Id.*

Courts have tended to allow many types of business situations to be encompassed by the UDTPA, including the practice of law. *Francorp, Inc. v. Siebert*, 211 F. Supp. 2d 1051, 1054 (N.D. Ill. 2002) (“unauthorized practice of law can be a deceptive trade practice”). But there are boundaries on its reach. In *Steinberg v. Chicago Medical School*, 69 Ill.2d 320 (Ill 1977), a medical school applicant’s allegation that the school failed to use stated criteria in evaluating his application did not state a cause of action. Similarly, impugning a competitor’s integrity, without impugning the quality of its product or services, does not state a statutory cause of action. *Republic Tobacco, L.P. v. North Atlantic Trading Co., Inc.*, 254 F. Supp. 2d 985 (N.D. Ill 2002) (competitor’s letter suggesting violation of federal law did not violate UDTPA); *Fedders Corp. v. Elite Classics*, 268 F. Supp. 2d 1051 (S.D. Ill 2003) (statement suggesting competitor engaged

in trade dress infringement, but quality of product not disparaged). Nor does “puffing” rise to the level of a statutory violation. *Smith v. American Arbitration Ass’n., Inc.*, 233 F.3d 502 (7th Cir. 2000) (alleged false commitment to balance and diversity on roster of arbitrators).

While anti-competitive behavior is the focus of the statute, a plaintiff need not show “actual” competition between the parties, actual confusion or misunderstanding. 815 ILCS 510/2; *Lawyers Title Ins. Corp. v. Dearborn Title Corp.*, 904 F. Supp. 818 (N.D. Ill 1995) (standing not limited to competitors or customers of defendant); *Thompson v. Spring-Green Law Care Corp.*, 126 Ill.App.3d 99 (First Dist. 1984) (unfair competition plaintiff may be granted relief even if his product or service is not in direct competition with defendant’s); *Zinser v. Rose*, 245 Ill.App.3d 881 (Third Dist. 9193) (chiropractors’ allegation that chiropractic review service was deceptive to consumers would not be dismissed for lack of standing).

However, the plaintiff must show a “likelihood” of actual confusion or misunderstanding. *Francorp, Inc. v. Siebert*, 211 F. Supp. 2d 1051 (N.D. Ill 2002) (reasonable likelihood of confusion suffices; private right of action under UDTPA for claim that competitor deceived market place by engaging in unauthorized practice of law); *Phillips vs. Cox*, 261 Ill.App.3d 78 (Fifth Dist. 1994) (allegations that sign-maker opened same business next door under similar name was sufficient for first business to show likelihood for confusion); *Industrial Specialty Chemicals Inc. v. Cummins Engine Co., Inc.*, 902 F. Supp. 805 (N.D. Ill 1995) (failure to state claim absent allegations of misrepresentation or consumer confusion as to source of product); *Knoll Pharmaceutical Co. v. Automobile Ins. Co. of Hartford*, 152 F. Supp. 2d 1026 (N.D. Ill 2001) (manufacturer advertising that its drug was superior to all other similar drugs alleged statutory offense of disparagement, allowing coverage under advertising injury policy); *Edgewater Beach Apartments Corp. v. Edgewater Beach Management Co., Inc.*, 12 Ill.App.3d 526 (First Dist. 1973) (operator of preexisting apartment building entitled to preliminary injunctive relief prohibiting second owner from using similar name with likelihood of confusion between them); *Empire Home Services, Inc. v. Carpet America, Inc.*, 274 Ill.App.3d 666 (First Dist. 1995) (carpet retailer stated a cause of action against business with a similar telephone number, leading potential customers to called the business, which passed off its goods and services to be those of the carpet retailer).

When the plaintiff is aware of allegedly misleading advertising, or when he consents, he cannot claim a likelihood of harm from the practice. *Hayna v. Arby’s Inc.*, 99 Ill.App.3d 700 (First Dist. 1981) (customer aware that advertised “roast beef” sandwiches were made of simulated beef); *Slatzberg v. Fishman*, 123 Ill.App.3d 447 (First Dist. 1984) (consent for law firm to use former associate’s name precluded unfair competition action by the associate).

Liability may be established even if a competitor did not act with an intent to deceive. *Zeller v. LaHood*, 267 F. Supp. 55 (C.D. Ill 1985) (competitor’s use of word

“gondola” to describe sandwich was likely to cause confusion, even if there was no intent to deceive).

Actions under the UDTPA may be brought by consumers, businesses or a government official. Although consumers have standing to bring an action, the typical private plaintiff is a business competitor, probably because the statute allows only injunctive relief, not damages, and there is a high standard for the award of costs or attorneys’ fees. Class actions are possible under the UDTPA but in the usual case, UDTPA class actions are brought in conjunction with claims under the ICFA.

The UDTPA has no requirement of notice before a suit is filed. Cases are tried to a judge, not a jury.² To prevail, a plaintiff must prove by a preponderance of the evidence that unfair or deceptive anticompetitive behavior occurs and that it is causing or is likely to cause injury.

Remedies. Injunctive relief is the only available remedy under the UDTPA. 815 ILCS 510/3. Courts apply the usual standards about whether to grant a TRO, preliminary or permanent injunctive relief. A claimant must allege facts that show current injury or a likelihood of future injury due to a deceptive or unfair business practice which should be redressed through an injunction. While damages are not awarded under the statute, in some instances, a UDTPA plaintiff has sought damages under the ICFA. *Dorr-Oliver Inc. v. Fluid-Quip, Inc.*, 834 F. Supp. 1008 (N.D. Ill 1993). The statute allows the same conduct to be the subject of additional remedies under the common law or other statutes. 815 ILCS 510/3. Costs or attorneys’ fees may be assessed against a defendant only if the court finds there was willful engagement in a deceptive trade practice or the liability was oppressive. *Id.*; *Allergy Asthma Technology, Ltd. v. I Can Breathe, Inc.*, 195 F. Supp. 2d 1059 (N.D. Ill 2002) (willful violation of UDTPA supported award of attorneys fees when manufacturer’s competitor passed off lower quality goods as though made by manufacturer).

Defenses. In some circumstances, federal law preempts the statute, such as in cases where the crux of the dispute is copyright or patent infringement. *See e.g., Goes Lithograph Co. v. Banta Corp.*, 26 F. Supp. 2d 1042 (N.D. Ill. 1998). Because the UDTPA mimics the Lanham Act, if claims involving trade names or trade dress are not protectible under the federal Lanham Act, they are not protectible under the UDTPA, either. *Spex, Inc. v. Joy of Spex, Inc.*, 847 F. Supp. 567 (N.D. Ill. 1994). When federal claims under Lanham Act for trademark infringement and UDTPA claims arise from same nucleus of operative facts, the federal court will typically assume supplemental jurisdiction over state law claims that the UDTPA was violated. *Euromarket Designs Inc. v. Crate & Barrel, Ltd.*, 96 F. Supp. 2d 824 (N.D. Ill. 2000) (federal and state claims arise from same circumstances, use of infringed trademarks or internet website and

² These elements are consistent with procedure under the ICFA.

labeling of goods). Conduct performed in compliance with a statute or orders or rules, of a statute administered by a federal, state or local government agency, is a statutory defense. 815 ILCS 510/4; *Wiskup v. Liberty Buick Co., Inc.*, 953 F. Supp. 958 (N.D. Ill. 1997) (defense of compliance with Consumer Leasing Act). *But see*, *Ashkanazy v. I. Rokeach & Sons, Inc.*, 757 F. Supp. 1527 (N.D. Ill. 1991) (later superseded by statute) (conduct that is lawful under antitrust laws may nonetheless violate the UDTPA).