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THE APPLICABILITY OF THE ILLINOIS CONSUMER FRAUD AND DECEPTIVE BUSINESS PRACTICES ACT TO PRIVATE WRONGS

Barbara A. McDonald*

INTRODUCTION

The Illinois Consumer Fraud and Deceptive Business Practices Act ("Act"), as written, provides a powerful means for redressing marketplace wrongs. The original Act, passed in 1961 and simply entitled the Consumer Fraud Act, granted the Illinois Attorney General the power to enjoin deception in the sale or advertising of any merchandise. In 1973, the Act was amended in several respects, the most significant of which created a private right of action. The 1973 amendment also expanded the prohibited conduct to include "unfair methods of competition and unfair or deceptive acts or practices . . . in the conduct of any trade or commerce . . ." As amended,


The author wishes to thank her friend and colleague Sharon F. Patterson and her sister Paula M. Rhodes for their valuable suggestions.


2. The original act outlawed the following:
   [t]he act, use or employment by any person 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, in connection with the sale or advertisement of any merchandise . . . .


4. The addition of section 10a was the most significant change. This section allows a private person to bring an action for damages under the Act. Section 10a also allows the court to award "reasonable attorney's fees and costs to the prevailing party." Section 10a(c) (codified as ILL. REV. STAT. ch. 121 1/2, para. 270a(c) (1987)).

5. ILL. REV. STAT. ch. 121 1/2, para. 262 (1987). The pertinent wording states that:
   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 or employment of any practice described
the Act's wording closely resembles that of the Federal Trade Commission Act ("FTC Act").

The Act derives its potency, in part, from the elimination of several of the major problems which a plaintiff encounters in pursuing a common law fraud action. For example, unlike a common law fraud action, a plaintiff suing under the Act need not prove that the defendant intended to deceive. Furthermore, a plaintiff may base his or her claim upon the defendant's misrepresentation of a future fact without the additional burden of proving that the defendant engaged in a scheme to defraud. The Act also provides for greater relief than a common law fraud action, because it allows a court to award attorney's fees to the prevailing party. Another of the Act's benefits is its expansive scope. The Act's prohibition against deceptive representations encompasses more than merely false statements; it also includes those representations which are literally true, but have a tendency to mislead. Furthermore, the Act extends beyond deceptive acts to prohibit unfair conduct in the course of business.

Many courts have been uncomfortable with the Act's expansive nature and have sought to limit its applicability despite the Act's express directive that it be interpreted liberally. As a result, some courts have held that the Act does not apply to "private wrongs," such as isolated instances of deception or unfair conduct. Rather, these courts have found that the Act is intended to redress only conduct that injures the public, or has an effect on consumers generally, such as conduct that is part of a pattern. Some

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8. Friedman, supra note 7, at 750.

9. The statute states:

   In any action brought by a person under this Section, the Court may award, in addition to the relief provided in this Section, reasonable attorney's fees and costs to the prevailing party.

   ILL. REV. STAT. ch. 121 1/2, para. 270a(c) (1987).


11. ILL. REV. STAT. ch. 121 1/2, para. 271(a) (1987).

12. It is unclear whether a "public injury" and an "effect on consumers generally" are interchangeable or distinct concepts. One of the cases discussed herein, Evanston Motor Co. v. Mid-Southern Toyota, 436 F. Supp. 1370 (N.D. Ill. 1977), indicates that an effect on consumers is one of two types of public injury, the other being an effect on competition. Another case discussed herein, Newman-Green, Inc. v. Alfonso-Larrain, 590 F. Supp. 1083 (N.D. Ill. 1984), also distinguishes between a "public injury" and an "effect on consumers generally." The Newman-Green court therein found that the Illinois courts were in conflict as
courts have imposed this "public effect" requirement only in cases brought by businesses rather than individuals and some courts have distinguished between consumer and non-consumer plaintiffs. Other courts have refused to adopt a "public effect" requirement under any circumstances. The Illinois Appellate Court has generally failed to analyze the issue thoroughly, however, and the Illinois Supreme Court has yet to resolve the existing conflict.

This article will begin with an examination of the various Illinois state court decisions which have adopted or rejected the "public effect" requirement. A discussion of the federal court decisions interpreting the Illinois Act will follow, with its focus on the decision in *Newman-Green, Inc. v. Alfonzo-Larrain*, the most frequently cited federal decision on this issue, and the decision in *Haroco, Inc. v. American National Bank & Trust* which broke from the *Newman-Green* progeny. Next, the distinctions which some state and federal courts have drawn between individual and business plaintiffs, and between consumer and non-consumer business plaintiffs, will be analyzed. Thereafter, the author will explain why the requirement of a "public effect" is unsupported by the statutory language of the Act, and why judicial interpretations of consumer fraud statutes in other states do not justify a "public effect" requirement in Illinois. Finally, the author will conclude that the Illinois courts should implement the language of the Act and recognize that the Act applies to private wrongs except when the plaintiff is a non-consumer, and no consumer impact is effected.

I. Conflicting Interpretations By The Courts

A. The Illinois Appellate Court Decisions

The Illinois Appellate Court opinions deciding the "public effect" issue are divided on the question. The conflict is not present merely among the districts; inconsistent opinions exist within districts as well. Surprisingly, most of the opinions advocating either side of the issue treat this important question in a rather cursory manner.

1. Adoption of a "Public Effect" Requirement

The Illinois Appellate Court decisions adopting a "public effect" requirement are not well-reasoned. The first reported Illinois decision imposing such a requirement is *Exchange National Bank v. Farm Bureau Life Insurance,* wherein the third district affirmed the dismissal of a claim under the...
Act, holding that the complaint failed to state a cause of action. According to the court, the complaint was defective because it lacked an allegation that the alleged deceptive conduct was part of a pattern engaged in by the defendant in the course of conducting its business. The plaintiffs in *Exchange National Bank* had obtained a loan commitment from Farm Bureau Life Insurance Company to build a commercial building. The loan had to be completed by a specified date or penalty charges would be assessed. The plaintiff claimed that various officers and employees of the insurance company had conspired prior to entering into the loan agreement to delay inspection of the building so that they could invoke the penalty clause.

In finding the absence of an alleged pattern of deceptive conduct to be fatal to the plaintiff's claim, the court reasoned that applying the Act to individual breach of contract actions would supplement common law contract actions in every case with a redundant remedy, a result which the court opined was not intended by the Act. The court failed, however, to cite any evidence to support its conclusion regarding legislative intent, and ignored the only then-existing Illinois decision on the issue, which had rejected a "public effect" requirement. Furthermore, the court's reasoning with regard to the creation of a redundant remedy is faulty. Not every breach of contract would be cognizable under the Act even if the Act were applied to private wrongs, because not every breach of contract involves deception or an "unfair" practice as that term has been construed. Moreover, a claim under the Act is not redundant of a breach of contract action. A plaintiff suing under the Act is free of the common law limitations on the extent of compensatory damages recoverable in contract, and can recover punitive damages and attorney's fees. Surprisingly, despite the logical defects in the

15. *Id.* at 213, 438 N.E.2d at 1249.
16. *Id.* at 216, 438 N.E.2d at 1250.
17. *Id.*
19. As a practical matter, the court's analysis of this case may have been affected by the credibility of the plaintiff's allegations. The court characterized the plaintiff's allegations as painting a "contrived" scenario and as "commercially . . . ridiculous." *Exchange National Bank v. Farm Bureau Life Ins.*, 108 Ill. App. 3d at 216, 438 N.E.2d at 1250. In fact, the third district discounted the precedential value of *Exchange National Bank* for this reason in *Tan v. Boyke*, 156 Ill. App. 3d 49, 508 N.E.2d 390 (3d Dist. 1987), *cert. denied*, 116 Ill. 2d 577, 515 N.E.2d 127, stating that "[w]e believe the *Exchange National Bank* court clearly concluded that there had in fact been no misrepresentation at all and that the plaintiff could properly have brought only an action for breach of contract." *Id.* at 59, 508 N.E.2d at 397.
20. Section 2 of the Act provides that the language of that section should be construed in light of the FTC and federal decisions interpreting the FTC Act. A long line of federal cases have interpreted the phrase "unfair acts or practices" under the FTC Act. *See infra* notes 162-65 and accompanying text.
Exchange National Bank opinion, its reasoning was accepted without further analysis by the fourth district in *Grass v. Homann*\(^2\) and by the first district in *Frahm v. Urkovich*.\(^2\) Even more questionable reasoning is found in dicta contained in *Feldstein v. Guinan*.\(^2\) The plaintiff in *Feldstein* had sued Cook County Hospital for breaching a medical residency contract. The first district held that the Act was inapplicable because it protects against unfair or deceptive acts in the conduct of any trade or commerce, and the practice of medicine is not a trade or commerce within the meaning of the Act.\(^2\) The *Feldstein* court, having decided that the Act was inapplicable because no trade or commerce was involved, had no reason to consider the "public effect" issue. Nevertheless, the court stated in dicta that the Act did not apply to private wrongs.

The context of this dicta is interesting. The plaintiff in *Feldstein* argued that a medical residency program is a trade or commerce citing the Illinois Supreme Court decision in *Scott v. Association for Childbirth at Home, International*\(^6\) as support. The court in *Scott* had held that the sale of educational services regarding childbirth is a trade or commerce under the Act. The *Feldstein* court criticized plaintiff's reliance on *Scott* incorrectly stating that the *Scott* court distinguished its earlier decision in *Steinberg v. Chicago Medical School*\(^7\) on the basis that *Steinberg* involved only a private

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23. 113 Ill. App. 3d 580, 586, 447 N.E.2d 1007, 1011 (1st Dist. 1983) (plaintiffs alleged that defendant, while acting as their attorney, misrepresented facts and failed to disclose other facts regarding real estate transaction).


25. Id. at 539. In reaching its decision, the *Feldstein* court relied in part on the Illinois Supreme Court's decision in *Steinberg v. Chicago Medical School*, 69 Ill. 2d 320, 371 N.E.2d 634 (1977), in which the court held that a rejected medical school applicant did not have standing under the Act because he was not a consumer. It is unclear what relevance the *Feldstein* court attached to *Steinberg*. It appears that the *Feldstein* court believed either that *Steinberg* held that the practice of medicine was not a trade or commerce, or that the plaintiff in *Feldstein* was analogous to a medical school applicant. In either case, the *Feldstein* court's reliance on *Steinberg* is misplaced. First, *Steinberg* did not hold that the practice of medicine was not a trade or commerce. Second, the plaintiff in *Feldstein* was not in the same position as the medical school applicant in *Steinberg*. A medical school applicant is not a consumer because he or she has not purchased or contracted to purchase anything. The plaintiff in *Feldstein*, on the other hand, had contracted to purchase the defendant's services.

*Steinberg* should not be misread to hold that only a consumer can sue under the Act as was done in *Broncata v. TRW, Inc.*, 629 F. Supp. 1412 (N.D. Ill. 1986) and *National Union Fire Ins. Co. v. Continental Illinois Corp.*, 652 F. Supp. 858, 860-61 (N.D. Ill. 1986). The *Steinberg* court observed that the title of the Act stated that it was to protect consumers, borrowers, and businesses. The court then held that the plaintiff did not fall within the Act's definition of a consumer. Obviously, the plaintiff, a medical school applicant, was not a borrower or a business in the context of the lawsuit. Consequently, the plaintiff did not belong to any of the groups protected by the Act. *Steinberg v. Chicago Medical School*, 69 Ill. 2d at 328, 371 N.E.2d at 638.

26. 88 Ill. 2d 279, 430 N.E.2d 1012 (1982).

27. 69 Ill. 2d 320, 371 N.E.2d 634 (1977).
wrong and that the Act does not redress purely private wrongs. However, the Scott court actually distinguished Steinberg on the ground that the issue in Steinberg was standing and the court held therein that a private person who is merely an applicant, rather than a purchaser, of services cannot sue under the Act. Contrary to the Feldstein court's conclusion, therefore, the Scott court did not dismiss the relevancy of Steinberg because it involved a private wrong, but because it involved an applicant, not a purchaser, of services. From its misinterpretation of Scott, the Feldstein court reasoned that the conduct alleged in the case before it was not actionable because it was a private wrong.

The first district similarly held, in the two most recent Illinois Appellate Court decisions to consider the "public effect" issue, that the Act does not apply to private wrongs. In Beaton & Associates v. Joslyn Manufacturing & Supply, for example, the defendant invoked the Act in a counterclaim brought against the plaintiff, who had served as a labor negotiator for the defendant. The defendant accused the plaintiff of failing to disclose its receipt of a referral fee from the company which it had selected to provide security services during a labor strike. The Beaton court affirmed the trial court's denial of relief under the Act with a very limited discussion of its rationale. The court did note that the Act was "intended to curb a variety of fraudulent abuses" and "to protect Illinois consumers, borrowers and businessmen." Nevertheless, the Beaton court relied solely on the dicta in Frahm v. Urkovich, and held that the Act was not intended to redress a dispute involving a purely private wrong.

Approximately six months later, the first district again refused to apply the Act to what it characterized as a private wrong. In Blake v. State Farm Mutual Automobile Insurance Co., the plaintiffs attempted to allege a class action against State Farm asserting that State Farm had not adequately offered increased underinsured motorist coverage to new policyholders. The Blake court held that the trial court correctly found that the lawsuit was not sustainable as a class action and therefore properly dismissed the Consumer Fraud Act claim since the Act did not apply to private wrongs.

The Blake court stated that the Act does not "extend to wrongs committed in the context of private transactions, but rather addresses wrongs committed in the course of business or trade." Yet the alleged wrong in Blake certainly

29. Id. at 840, 512 N.E.2d at 1289.
30. See id. at 846-47, 512 N.E.2d at 1293.
31. Id. at 846, 512 N.E.2d at 1293.
32. Id.
34. Beaton, 159 Ill. App. 3d at 846-47, 512 N.E.2d at 1293.
36. Id. at 924, 523 N.E.2d at 89.
37. Id.
occurred in the course of State Farm's business. Presumably, the Blake court intended, by the quoted language, to convey that a wrong had to be a systematic practice of the defendant to be actionable under the Act. In reaching its decision, the Blake court relied upon Grass, Exchange National Bank, and the dicta in Frahm. Neither Beaton nor Blake addressed the earlier conflicting first district opinion in Duncavage v. Allen, nor the conflicting opinions in other districts, all of which are discussed below.

2. Rejection of a "Public Effect" Requirement

The reasoning of those courts that have rejected a "public effect" requirement, although far from exhaustive, is generally sounder than the reasoning of those courts that have adopted such a requirement. One reason is that some of the courts rejecting a "public effect" requirement have at least addressed the language of the Act itself.

M & W Gear Co. v. AW Dynamometer, Inc., for example, was a dispute between the two major American manufacturers of agricultural dynamometers. The plaintiff alleged that the defendant's advertisements contained false and misleading statements about the plaintiff's product. The defendant argued on appeal that the plaintiff had failed to prove an essential element of its Consumer Fraud Act claim because it had neither alleged nor proved that the defendant's conduct had an adverse effect on the public. The defendant asserted that a "public effect" requirement arose from the Act's language directing courts construing the Act to consider interpretations of the Federal Trade Commission ("FTC") and the federal courts relating to section 5(a) of the FTC Act.

In dismissing the defendant's argument, the fourth district noted that the FTC Act, unlike the Illinois statute, expressly conditioned the FTC's authority to take action against a violator on the FTC finding that the proceeding would be in the public interest. The M & W Gear court reasoned that the Illinois legislature intentionally omitted such language. The court

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38. The court expressed the concern that an action under the Consumer Fraud Act would provide "a redundant remedy to redress a private wrong." Id. (citations omitted).
42. M & W Gear, 97 Ill. App. 3d at 914, 424 N.E.2d at 365. Section 5(b) of the FTC Act, 15 U.S.C. § 45(b) (1982), governs FTC proceedings and provides in part that the FTC may institute a proceeding when it has reason to believe that the FTC Act is being violated and that a proceeding would be in the interest of the public. Section 7 of the Illinois Act, Ill. Rev. Stat. ch. 121 1/2, para. 267 (1987), contains a similar requirement for actions instituted by the Illinois Attorney General. In contrast, section 10a, Ill. Rev. Stat. ch. 121 1/2, para. 270a (1987), which provides for a private right of action, contains no such requirement.
43. M & W Gear, 97 Ill. App. 3d at 913-14, 424 N.E.2d at 365.
also found that section 10a of the Illinois Act, which provides that any person damaged by a violation of the Act may sue for damages, was indicative of the Act's applicability to private wrongs because of the language "any person." Although the M & W Gear court reached the correct conclusion, its reasoning on this latter point is not persuasive because the essence of a private right of action is the ability of any person affected by the actionable conduct to sue. The actionable conduct nevertheless could be limited to acts affecting the public.

The fifth district reached the same result using different reasoning in Tague v. Molitor Motor Co. The court in Tague noted that section 2 of the Act prohibits the "use or employment of any deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact." Accordingly, the Tague court could find no reason why such a broad description would not apply to private as well as public wrongs.

The first district later adopted the reasoning of Tague in Duncavage v. Allen. The plaintiff in Duncavage sued a landlord on behalf of a tenant who was murdered in her apartment by an intruder. Interestingly, the first district did not explain or even acknowledge the inconsistency between its holding in Duncavage that the Act is applicable to private wrongs and its earlier contrary dicta in Frahm.

Several months after the decision in Tague, the fifth district again rejected a "public effect" requirement in Warren v. LeMay. Warren, however, is

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44. ILL. REV. STAT. ch. 121 1/2, para. 270a (1987).
45. Id.
46. M & W Gear, 97 Ill. App. 3d at 914, 424 N.E.2d at 365.
47. 139 Ill. App. 3d 313, 316, 487 N.E.2d 436, 438 (5th Dist. 1985) (suit by allegedly defrauded purchaser of used car).
48. Id. at 316, 487 N.E.2d at 438 (quoting ILL. REV. STAT. ch. 121 1/2, para. 262 (1987) (emphasis added)).
49. 147 Ill. App. 3d 88, 102, 497 N.E.2d 433, 440 (1st Dist. 1986).
50. Id. The murderer entered the decedent's apartment through a window that the tenant could not lock, using a ladder that the landlord stored in the yard adjacent to the decedent's apartment. The landlord allegedly knew that a previous tenant had been burglarized in the same manner. The plaintiff claimed that the defective window, the failure to remove the ladder from the yard and other defects in the apartment violated the local housing and building code. Id. The plaintiff further claimed that the landlord had violated the Consumer Fraud Act by failing to advise the decedent of either the dangerous situation that led to the prior burglary or the code violations, thus causing the decedent's death. Id.
51. One explanation for the inconsistent treatment of this issue by the first district is that Duncavage, the only first district case holding that the Act does not require a public effect, was decided by the second division whereas the other first district cases addressing the issue were decided by other divisions (i.e., different panels of judges). For example, Beaton & Assoc. v. Joslyn Mfg. & Supply, 159 Ill. App. 3d 834, 512 N.E.2d 1286 (1st Dist. 1987), was decided by the fourth division; Feldstein v. Guinan, 148 Ill. App. 3d 610, 499 N.E.2d 535 (1st Dist. 1986); was decided by the third division; and both Frahm v. Urkovich, 113 Ill. App. 3d 580, 447 N.E.2d 1007 (1st Dist. 1983), and Blake v. State Farm Mut. Auto. Ins. Co., 168 Ill. App. 3d 918, 523 N.E.2d 85 (1st Dist. 1988), were decided by the first division.
52. 142 Ill. App. 3d 550, 491 N.E.2d 464 (5th Dist. 1986).
not as well-reasoned as the other cases rejecting a "public effect" requirement. *Warren* was a suit by a purchaser of a termite-infested home against the realtors and the exterminating company that performed a pre-sale inspection. The plaintiffs' Consumer Fraud Act claim was based upon the defendants' failure to disclose that the house had been retreated for termites on a number of occasions and that visible evidence of termite activity and damage existed at the time of sale. In holding that the plaintiffs had established a claim under the Act, the *Warren* court did not rely upon or even mention *Tague* or any language of the Act, but instead factually distinguished *Grass v. Homann*, which also involved an erroneous termite inspection report.53

Specifically, the *Warren* court noted that in the case before it, unlike *Grass*, the plaintiffs were not in privity with the termite inspection company. The court also found that the termite inspection report was central, not tangential to the plaintiffs' purchase of the home, and that the misrepresentation was directly related to the plaintiffs' loss. Finally, the court found that the termite inspection company stood to benefit from the misrepresentation because the termite infestation may have triggered a guarantee that the company previously had given the sellers.54 The *Warren* court's detailed discussion of the factual differences of *Grass* did not disclose why these differences resulted in the *Warren* claim being cognizable under the Act when the *Grass* claim was not.55 Although proximate cause is an element of a claim under the Act, neither a lack of privity between the parties nor a benefit to the defendant is required in an action under the Act.56

B. The Federal Court Decisions

The overwhelming majority of the federal district court cases addressing this issue hold that a "public effect" is an essential element of a claim under

54. Id.
55. The *Grass* court stated in its opinion that the Act did not apply to the isolated breach of contract alleged therein. According to the court, this was cemented by the fact that the termite inspection company was only tangentially involved in the purchase of the home and did not benefit from the sale. 130 Ill. App. 3d 874, 880, 474 N.E.2d 711, 715 (4th Dist. 1985). The *Grass* court did not explain, however, why it believed that the Act required either a greater nexus between the consumer transaction and the violator or a benefit to the defendant. Yet the *Warren* court apparently accepted the *Grass* court's intimation that these factors were significant. *Warren*, 142 Ill. App. 3d at 566-67, 491 N.E.2d at 474-75.
56. The *Warren* court also incorrectly stated that the *Grass* court voiced a minority position. In support of this statement, the *Warren* court cited a number of cases decided under the Act involving private wrongs. 142 Ill. App. 3d at 567-68, 491 N.E.2d at 474-75. None of the cases cited, however, addressed the "public effect" issue. In reality, only four Illinois Appellate Court cases had decided this issue prior to *Warren*. *Exchange National Bank* and *Grass* imposed a public injury requirement while *M & W Gear* and *Tague* rejected such a requirement. *Frahm* and *Feldstein* addressed this issue only in dicta indicating that a "public effect" was an element of a claim under the Act.
the Act. Like those Illinois Appellate Court decisions adopting a "public effect" requirement, the federal cases contain questionable reasoning.

1. The Early Federal Cases

The United States District Court for the Northern District of Illinois first addressed the "public effect" issue in Evanson Motor Co. v. Mid-Southern Toyota. In analyzing the decision, it is important to note that there were no published state court opinions on the "public effect" issue at that time. The plaintiff in Evanson Motor alleged that the defendants had conspired to allocate the supply of new Toyota automobiles in a discriminatory and unfair manner favoring dealers who sell only Toyotas to dual-line dealers like the plaintiff. One of the plaintiff's claims alleged that the defendant's conduct constituted an "unfair method of competition" under the Act. The district court found, however, that the plaintiff had not alleged facts to support a claim that the alleged conspiracy had an anti-competitive effect on the relevant market. The court therefore dismissed the plaintiff's claim holding that an injury to the public, either direct or indirect, through an effect on competition, was an essential element of a cause of action under the Act.

The Evanson Motor court based its holding on the Act's reference to section 5(a) of the FTC Act, and United States Supreme Court decisions regarding the kind of conduct the FTC could prosecute under section 5 of the FTC Act. The Evanson Motor court concluded that because a public injury is an element of an action under the FTC Act, it is also an element of an action under the Illinois Act. The Evanson Motor court failed to

57. Almost all of the federal decisions addressing the "public effect" issue were decided by the United States District Court for the Northern District of Illinois. As this article was going to press, the Seventh Circuit decided First Comics, Inc. v. World Color Press, Inc., Nos. 88-2731 & 88-2745 (7th Cir. Sept. 19, 1989). Although the court recognized the split of authority in both the state and federal systems, slip op. at 11, the court nonetheless held that "consistent with the Act, it was incumbent upon First Comics to show that World Color Press's 'misconduct injured consumers generally.'" Id. slip op. at 14 (citing Jays Foods, Inc. v. Frito-Lay, 664 F. Supp. 364, 369 (N.D. Ill. 1987)).


59. Id. at 1372.

60. Id. at 1373 (quoted in text).

61. Id. at 1373-74.

62. Id.

63. Id. at 1374.

64. The court cited the Illinois Supreme Court's 1978 decision in Fitzgerald v. Chicago Title & Trust Co., 72 Ill. 2d 179, 381 N.E.2d 790 (1978) (no violation of section 5 of FTC Act because product involved was title insurance, an intangible, but Illinois Act explicitly applicable
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consider, however, that the FTC is constrained to prosecute only conduct affecting the public by the explicit requirement in section 5(b) of the FTC Act which requires that a proceeding under the Act be in the public interest, a requirement not found in the section of the Illinois Act that provides for a private right of action.

_Evanston Motor_ was rejected by the next two federal decisions addressing this issue, _In Re CDLC Management Corp._ and _Overland Bond and Investment Corp. v. Car Credit Center Corp._, because, in the interim, the Illinois Appellate Court had decided _M & W Gear_ holding that a public injury or effect was not an element of a claim under the Act.


In 1984, the United States District Court for the Northern District of Illinois reintroduced the "public effect" requirement in _Newman-Green, Inc. v. Alfonzo-Larrain_, the most frequently cited federal decision on this issue. The defendant in _Newman-Green_ invoked the Act as a counterclaim alleging that the plaintiff fraudulently induced the defendant to enter into an agreement to manufacture and sell the plaintiff's products. In dismissing the counterclaim, the _Newman-Green_ court found that there was "considerable evidence" that the Act was not intended to supplant the common law of contracts and fraud. Yet the court referred only to case law and did not discuss the language of the Act itself.

to the sale of any services and any property, tangible or intangible, and thus Illinois Act was violated). The _Evanston Motor_ court construed _Fitzgerald_ as requiring section 2 of the Act, in the absence of Illinois precedent, to be read _in pari materia_ with section 5(a) of the FTC Act. Therefore, the _Evanston Motor_ court concluded that because the FTC Act requires a public injury, the Illinois Act similarly requires a plaintiff to demonstrate some public injury in order to state a cause of action. _Evanston Motor Co. v. Mid-Southern Toyota_, 436 F. Supp. at 1374.

65. 15 U.S.C. § 45(b) (1982). The statute specifically requires that a proceeding by the Commission for a violation of the Act "be in the interest of the public." _Id._

66. 18 B.R. 797, 799-800 (N.D. Ill. 1982). In _CDLC Management_, the defendants moved to amend their crossclaim to allege the commission of unlawful practices by the plaintiff in violation of the Act. _Id._ at 798. The plaintiffs argued that the Act was not available to redress purely private wrongs involving "unique and individual transactions." _Id._ at 799. Relying on both _M & W Gear_ and the language in section 10a of the Act that allows "any person" to sue, the _CDLC Management_ court found that "although Section 5 of the FTC Act may not provide a remedy for private injury, the Illinois Act does provide such a remedy and no public harm need be alleged nor proved." _Id._ at 800.

67. No. 82 C 2283, slip op. 5-6 (N.D. Ill. July 30, 1984) (viewing _M & W Gear_ as controlling since it was the only Illinois decision on the issue, and therefore holding that no allegation of public injury was required under the Act).

68. It should be noted that _Evanston Motor_ involved a claim of unfair competition, unlike _Overland Bond_ and almost all of the other cases discussed in this article, which alleged deceptive acts. None of the courts which relied upon or rejected _Evanston Motor_ gave any consideration to whether a claim for unfair competition (or unfair acts) should be treated differently than a claim for deception when addressing the "public effect" issue.


70. _Id._ at 1086.
The court distinguished between the concepts of "public injury" and "an effect on consumers generally." The court found that Illinois case law was in conflict only as to the necessity of "a public injury." In the court's opinion, the then-existing Illinois case law clearly required that a cause of action under the Act allege "an effect upon consumers generally." As a result, the court rested its dismissal of the counterclaim on the defendant's failure to allege an effect on consumers generally. More specifically, the court held that a plaintiff suing under the Act must show that the defendant has engaged in deceptive practices in promoting its goods or services to its market in general.

In the course of its discussion of the Illinois case law, the Newman-Green court suggested that M & W Gear, the only Illinois decision at that time rejecting a public injury requirement, may have rested on unnecessarily broad grounds. The court reasoned that the M & W Gear court could have found that the deceptive advertising alleged therein gave rise to a presumption of public injury. The Newman-Green court also noted that the fact that M & W Gear involved allegedly deceptive advertising made it a "consumer protection case within the core meaning of the Act." The impact of the Newman-Green decision was significant. Most of the federal cases addressing the "public effect" issue that were decided after Newman-Green rely, at least in part, on its holding.


An exception to the numerous federal cases following Newman-Green and finding a "public effect" requirement is Haroco, Inc. v. American National Bank & Trust Co. decided in 1986. Haroco was a class action by commercial borrowers against their lending bank, alleging fraud in the calculation of a fluctuating interest rate. Although the Haroco court chose not to discuss either Tague, Warren, or Duncavage, its opinion is nevertheless well reasoned.

In Haroco, the plaintiffs claimed that the defendant defrauded them by calculating the interest rates on certain loans taken out by the plaintiffs in a different manner than that specified in the loan agreements. The plaintiffs

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71. Id. at 1087.
72. Id. at 1086 n.3.
75. Between the time Newman-Green was decided and the Haroco decision, the Illinois courts had rejected the "public effect" requirement in three cases: Duncavage v. Allen, 147 Ill. App. 3d 88, 497 N.E.2d 433 (1st Dist. 1986); Warren v. LeMay, 142 Ill. App. 3d 550, 491 N.E.2d 464 (5th Dist. 1986); Tague v. Molitor Motor Co., 139 Ill. App. 3d 313, 487 N.E.2d 436 (5th Dist. 1985).
76. 647 F. Supp. at 1028.
further alleged that the defendant's fraudulent interest rate calculations were actionable under the Act. The defendant responded by asserting that the plaintiffs had not sufficiently alleged a public injury, and thereby had failed to state a cause of action under the Act.

In rejecting a "public effect" requirement, the Haroco court acknowledged the contrary authority of Newman-Green, Frahm, Exchange National Bank, and Evanston Motor, but noted that:

Courts, aghast at the apparent breadth of [the Act and RICO] have searched for means to limit their reach. In the case of the Consumer Fraud Act, some courts, fearful that the Act will reach purely private disputes otherwise reserved to the common law, have required proof of a public injury, or at least, an effect upon consumers generally.

The Haroco court concluded that the only case containing substantial analysis supporting a "public effect" requirement, Evanston Motor, was not well-reasoned. The Evanston Motor court read the Illinois Supreme Court decision in Fitzgerald v. Chicago Title & Trust Co. as requiring the language of section 2 of the Illinois Act to be read in pari materia with section 5(a) of the FTC Act absent Illinois precedent. The Evanston Motor court then examined the jurisprudence under section 5(b) of the FTC Act to determine whether the complaint stated a cause of action under that section.

The Haroco court criticized the Evanston Motor court's reasoning on two grounds. First, the Haroco court noted that section 2 of the Illinois Act references section 5(a) of the FTC Act, not section 5(b). Therefore, a private action under the Illinois Act does not have to meet the section 5(b) requirement that an action serve the public interest. Second, Fitzgerald indicated that the reference in section 2 to section 5(a) merely ties the interpretation of the Illinois Act's underlying offenses, which are set forth in section 2, to that of the FTC Act's offenses, which are set forth in section 5(a).

The Haroco court also criticized Evanston Motor for failing to appreciate that Fitzgerald recognized that differences between the Illinois Act and the FTC Act must be respected. Accordingly, the Haroco court found that the requirement that FTC enforcement proceedings be in the public interest had no applicability to private actions under the Illinois Act because the FTC

77. Id. at 1034.
78. Id.
79. Id.
80. Id.
84. Id.
85. Id. at 1034 (the court noted that Fitzgerald held that the Consumer Fraud Act reaches transactions in intangibles whereas the FTC does not).
Act, unlike the Illinois Act, does not provide for a private cause of action.\textsuperscript{86} Moreover, as the Haroco court explained, section 10a of the Illinois Act, which grants a private right of action, does not mention a public injury or effect requirement.\textsuperscript{87} In contrast, section 7,\textsuperscript{88} which allows the Illinois Attorney General to initiate enforcement proceedings, explicitly states that such proceedings must be in the public interest. The Haroco court concluded that this difference in language suggested an intentional omission of the public interest language from section 10a.\textsuperscript{89} Consequently, the Haroco court held that the plaintiffs did not have to allege a public injury to state a cause of action under the Act.\textsuperscript{90}

4. After Haroco

Despite its sound reasoning, the Haroco opinion has been largely ignored by subsequent federal decisions. Those cases which have acknowledged Haroco have criticized its holding.\textsuperscript{91} For example, both Jays Foods, Inc. v. Frito-Lay\textsuperscript{92} and Hangsteffer v. Insco\textsuperscript{93} suggest that Haroco may rest upon unnecessarily broad grounds because the defendant bank in Haroco allegedly had engaged in deceptive practices addressed to a broad segment of its market, and therefore a "public effect" existed.\textsuperscript{94}

This is not sufficient justification, however, for the failure of subsequent cases to recognize Haroco's logical analysis of the Act's language. In any event, Neece v. John Hancock Mutual Life Insurance Co.,\textsuperscript{95} a decision which followed the ruling in Haroco, is not subject to the criticism that it rests upon unnecessarily broad grounds. Neece involved a defendant's alleged misrepresentations in the sale of life insurance to one married couple,\textsuperscript{96} conduct which clearly did not have a "public effect." Nevertheless, the Neece court held that the plaintiffs had stated a cause of action under the Act. It is more understandable that the federal courts have overlooked the Neece decision, however, because it is unpublished.

\textsuperscript{86} Id. at 1034.
\textsuperscript{87} Id. at 1034-35 (citing ILL. REV. STAT. ch. 121 1/2, para. 270e (1987)).
\textsuperscript{88} ILL. REV. STAT. ch. 121 1/2, para. 267 (1987).
\textsuperscript{89} 647 F. Supp. at 1035. The court noted that the Act indicates "where the legislature intended such a [public injury] requirement, it expressly provided therefore." Id.
\textsuperscript{90} Id.
\textsuperscript{92} 664 F. Supp. 364, 369 (N.D. Ill. 1987).
\textsuperscript{93} No. 86 C 1022 (N.D. Ill. Oct. 27, 1987).
\textsuperscript{95} No. 86 C 7572 (N.D. Ill. June 10, 1987).
\textsuperscript{96} See id. slip op. at 2.
Haroco was also criticized in dicta in Broncata v. TRW, Inc. for allegedly failing to use the “predictive approach” to determine the manner in which the Illinois Supreme Court would decide the “public effect” issue. Interestingly, the Broncata court’s own use of the predictive approach consists of two conclusory statements that the more rational position requires a public injury and that the Act is more rationally intended to reach practices that affect consumers generally rather than private wrongs. The only Illinois case cited by Broncata is Frahm v. Urkovich, which discussed the “public effect” issue only in dicta.

Although the Haroco court did not state that it was using the predictive approach, its reasoning is actually a better example of the predictive approach than the Broncata court’s approach, because Haroco contains a much more thorough analysis which is based in part upon the Illinois Supreme Court decision in Fitzgerald. Nevertheless, recent federal decisions on this issue adopt the reasoning of Newman-Green rather than the superior analysis of Haroco.

II. CONSIDERATION OF THE PLAINTIFF’S STATUS: INDIVIDUAL OR BUSINESS? CONSUMER OR NON-CONSUMER?

Only two of the Illinois Appellate Court decisions addressing the “public effect” issue involved plaintiffs who were businesses: M & W Gear, discussed earlier, and Century Universal Enterprises v. Triana Development Corp., discussed below. In contrast, almost all of the federal cases involved business plaintiffs. This may partially explain why the overwhelming majority of the federal courts imposed a “public effect” requirement whereas the Illinois courts are more evenly divided on the issue. The federal judges may have been reluctant to liberally apply a consumer fraud statute to disputes between businesses. Only some of the federal courts, however, actually voiced this concern or expressly limited their holdings to cases brought by business plaintiffs. Moreover, most failed to adequately explain this distinction in light of the Act’s explicit intent to protect businessmen as well as consum-

97. No. 87 C 0042 (N.D. Ill. Dec. 15, 1987). The plaintiff in Broncata alleged that the defendant, a company that collected credit information on individuals, had provided incorrect information about the plaintiff to a credit card company. Allegedly, that misinformation resulted in the termination of the plaintiff’s credit card account. The court held that the plaintiff had failed to state a cause of action under the Act because he had not alleged any misrepresentation made to him by the defendant, and because he was not a consumer with respect to the wrong of which he complained. Id. slip op. at 1. The Broncata court, however, did not adequately explain why the defendant had to make a misrepresentation to the plaintiff, nor why the plaintiff was not a consumer in this context. Id. slip op. at 1. After all, the plaintiff’s ability to act as a consumer obviously was affected by the termination of his credit card.

98. Id. slip op. at 2 n.1.
99. Id. slip op. at 2.
100. Id.

Furthermore, many failed to appreciate that a business can be a consumer within the meaning of the Act if it is purchasing merchandise or services for its own use rather than for resale. Finally, some of the federal courts imposed a "public effect" requirement even though the plaintiff was an individual consumer.

The following discussion will examine the only Illinois Appellate Court case that addresses whether a plaintiff's status as a business should affect the analysis of the "public effect" issue. The author will then re-examine *Newman-Green, Inc. v. Alfonzo-Larrain*\(^{103}\) and analyze its progeny to determine whether the courts deciding those cases considered or should have considered the plaintiff's status as a business, individual, consumer, or non-consumer.

A. The Illinois Appellate Court's Decision in *Century Universal*

Prior to 1987, the only Illinois Appellate Court decision involving a dispute between businesses was *M & W Gear Co. v. A W Dynamometer, Inc.*\(^{104}\) The court deciding that case did not attach any significance to the fact that the plaintiff was a business. In 1987, the second district decided *Century Universal Enterprises v. Triana Development Corp.*,\(^{105}\) which also involved a dispute between businesses. Unlike the *M & W Gear* court, the *Century Universal* court did consider the plaintiff's status as a business.

*Century Universal* involved a joint venture real estate development which proved unprofitable. The Consumer Fraud Act claim alleged that the defendants misrepresented that they had the knowledge and ability to operate the joint venture project. Relying on the Act's language that it "shall be liberally construed"\(^{106}\) and the first district's opinion in *Duncavage*, the *Century Universal* court found that one does not need to allege a public injury to recover under the Act.\(^{107}\) The court nevertheless held that the claim had been properly dismissed because it involved a dispute between businesses who were not consumers of each other's goods or services.\(^{108}\)

Unfortunately, the court did not clearly articulate its reasoning. It is not readily apparent whether the court believed that non-consumer businesses

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102. The full title of the Act is:
An Act to protect consumers and borrowers and businessmen against fraud, unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce and to give the Attorney General certain powers and duties for the enforcement thereof.

ILL. REV. STAT. ch. 121 1/2 (1987).

103. See supra notes 69-72 and accompanying text.

104. 97 Ill. App. 3d 904, 424 N.E.2d 356 (4th Dist. 1981); see supra notes 40-46 and accompanying text.


106. *Id.* at 198, 510 N.E.2d at 1269 (quoting ILL. REV. STAT. ch. 121 1/2, para. 271a (1987)).

107. *Id.* at 198, 510 N.E.2d at 1269.

108. *Id.* at 199, 510 N.E.2d at 1270.
could never sue under the Act or whether the court instead believed that non-consumer businesses could sue only if the dispute had an impact on consumers, such as the dispute in *M & W Gear* which involved deceptive advertising. The *Century Universal* court quoted from *Newman-Green, Inc. v. Alfonzo-Larrain*, stating that absent a "public injury," the Act was limited to conduct that "affect[s] consumers generally." The *Century Universal* court found this principle consistent with the Illinois Appellate Court cases applying the Act to private wrongs committed against consumers. One could conclude from the court's discussion that the court believed that a dispute between businesses would be covered by the Act if a public injury or an effect on consumers generally was pled and proved. Yet in giving its holding the court merely stated that the claim was correctly dismissed "on the basis that the disputes herein between businessmen, who are not consumers of each other's goods or services, did not fall within the ambit of the [Act]."

**B. Newman-Green and its Progeny**

It was actually in *Newman-Green, Inc. v. Alfonzo-Larrain*, decided several years before the Illinois Appellate Court decision in *Century Universal*, that the idea of treating business plaintiffs differently than individual plaintiffs first emerged. This idea was not integral to the *Newman-Green* court's decision, however. The court found that "an effect on consumers generally" was an element of a cause of action under the Act, relying on its interpretation of the then-existing case law on the issue. As additional support for its holding, the court stated that it was reasonable to read the 1973 amendment to the title of the Act, which added a reference to the protection of businessmen, as granting businesses standing only when they are injured as a result of other businesses deceiving consumers. The court did not, however, expressly limit its holding to actions brought by businesses. The court also did not distinguish between businesses which act as consumers and businesses, like the defendant/counterplaintiff in *Newman-Green*, who do not act in a consumer capacity. As a result of the *Newman-Green* court's

110. 158 Ill. App. 3d at 199, 510 N.E.2d at 1270.
111. *Id.* The Act defines "consumer" in section 1(e) as follows: "The term 'consumer' means 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." *Ill. Rev. Stat.* ch. 121 1/2, para. 261(e) (1987). The Act defines "person" in section 1(c) as follows: "The term 'person' includes 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, trustee or cestui que trust thereof." *Ill. Rev. Stat.* ch. 121 1/2, para. 261(c) (1987). Consequently, a business is a consumer when it purchases merchandise for its own use rather than for resale.
112. 590 F. Supp. 1083 (N.D. Ill. 1984); see supra notes 69-72 and accompanying text.
113. 590 F. Supp. at 1086.
failure to carefully analyze the significance of the defendant/counterplaintiff's status as a non-consumer business, *Newman-Green* was followed in cases involving all types of plaintiffs.

1. Consumer Plaintiff Cases

   a. Individual consumers

   The United States District Court for the Northern District of Illinois relied on *Newman-Green* to dismiss actions brought by individual consumer plaintiffs even after the Illinois Appellate Court decided *Tague, Warren*, and *Duncavage*, all of which involved individual plaintiffs, and rejected a "public effect" requirement. For example, in *Huss v. Goldman, Sachs & Co.*,\(^{114}\) decided after both *Tague* and *Warren*, the court *sua sponte* dismissed a claim under the Act by an individual purchaser of stock, summarily concluding that the word "consumer" in the Act's title implied that it was not intended to "afford protection for your garden-variety, everyday million-share purchaser" such as the plaintiff.\(^{115}\) The court also stated that the "one-on-one alleged misrepresentations" involved therein were not covered by the Act, citing *Newman-Green* as authority.\(^{116}\)

   Similarly, the court in *National Union Fire Insurance Co. v. Continental Illinois Corp.*,\(^{117}\) found that the case law had rejected application of the Act to a situation like the case before it, in which the defendant allegedly had made misrepresentations to individual purchasers of commercial insurance.\(^{118}\) The court, however, ignored the contrary Illinois case law and instead relied solely upon *Newman-Green*. The court stated that "it strains normal language usage" to speak of a purchaser of a separately-negotiated insurance policy as a consumer within the purview of a consumer fraud statute.\(^{119}\)

   Neither the *Huss* court nor the *National Union Fire Insurance Co.* court explained why the individual plaintiffs therein did not fall within the Act's definition of a consumer, which encompasses any person who purchases or contracts for the purchase of merchandise for his own use rather than for resale in the ordinary course of his business.\(^{120}\)

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115. *Id.*
118. *Id.*
119. *Id.* at 861.
120. In *National Union Fire Ins. Co.*, the court initially held that the individual defendants were not consumers because it was the corporation that employed them that actually purchased the D&O policy. 652 F. Supp. at 861. The court further stated, however, that even were the defendants able to sue as purchasers or third-party beneficiaries they would be out of court for the reasons stated *supra* in notes 117-19 and accompanying text.
b. Business consumers

Relying in part on Newman-Green, the United States District Court for the Northern District of Illinois also ignored the recent Illinois case law rejecting a "public effect" requirement in a number of cases brought by businesses in their capacity as consumers.121 In Joslyn Manufacturing & Supply Co. v. Honeywell Information System,122 the plaintiff corporation was a supplier of products and services to electric utilities and the telecommunications industry. It entered into an agreement with the defendant corporation for the design of a computerized order processing system. After several years of attempting to cure defects in the system, the plaintiff claimed that the system never worked and demanded a refund. When the defendant refused, litigation ensued. Although the precise basis for the Consumer Fraud Act claim is not clear from the opinion, the plaintiff apparently alleged that the defendant made misrepresentations about the system and/or the defendant's ability to design the system.123 The Joslyn court interpreted the Newman-Green line of cases as demonstrating that Illinois requires a business in an arm's length transaction to show that the defendant's conduct had an effect upon the public generally.124 The Joslyn court did not consider the fact that the plaintiff in the case before it was a consumer of the defendant's computer system whereas the Consumer Fraud Act claimant in Newman-Green was not a consumer.

In Horsell Graphic Industry v. Valuation Counselors,125 the United States District Court for the Northern District of Illinois similarly failed to apply the Act to a business acting in its capacity as a consumer. The plaintiff in Horsell clearly fell within the Act's definition of a consumer because it alleged fraud in the defendant's appraisal of stock which the plaintiff had purchased from the defendant.126 The court nevertheless rejected the plaintiff's reliance on Campbell v. Moseley, Hallgarten, Estabrook & Weeden, Inc.,127 in part because the Campbell plaintiff was an eighty-one year old widow and not a business.128 The Horsell court found the business plaintiff's failure to allege any public injury to be fatal to its claim under the Act.129

122. No. 79 C 4561 (N.D. Ill. Apr. 1, 1986).
123. Id. slip op. at 1.
124. Id. slip op. at 3.
126. Id. at 1122.
128. 639 F. Supp. at 1122. The court also distinguished Campbell because it involved the sale of securities, not an appraisal report like the case at bar. Id.
129. Id.
stating that it was "constrained" by the decision in *Frahm v. Urkovitch*.

The *Horsell* court was apparently oblivious both to the fact that the *Frahm* discussion was dicta and to the contrary position taken by the Illinois Appellate Court in *Tague* and *Warren*.

The United States District Court for the Northern District of Illinois correctly found in *Analysts International Corp. v. Recycled Paper Products* that the business plaintiff therein was a consumer within the meaning of the Act, but nevertheless held that the plaintiff had to allege something more than injury to itself in order to state a cause of action. The *Analysts International* court acknowledged the split in Illinois authority regarding a public injury requirement, but cited only to *M & W Gear* and *Frahm* while ignoring *Tague*, *Warren*, and *Duncavage*, the most recent of which was decided nine months earlier. The court also incorrectly stated without explanation, and with reference only to *Exchange National Bank*, that "[a]ll Illinois courts agree that the Act is not available to redress purely private wrongs."

2. **Non-consumer Plaintiff Cases**

In addition to those cases involving individual plaintiffs and business plaintiffs acting in a consumer capacity, many courts have also followed *Newman-Green* and its progeny in cases involving non-consumer business plaintiffs. This is more understandable because the business which filed the counterclaim in *Newman-Green* was not acting as a consumer. Furthermore, the only case involving a business plaintiff decided by the Illinois courts prior to *Century Universal* in 1987, and *M & W Gear*, involved allegedly deceptive advertising, an activity clearly affecting consumers.

The issue of a non-consumer business plaintiff's standing to bring suit under the Act is most thoroughly discussed in *Jays Foods, Inc. v. Frito-Lay*. In *Jays Foods*, the business plaintiff alleged that Frito-Lay, a com-

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130. *Id.* The *Horsell* court found the facts of the case before it more closely resembled the facts in the *Frahm* case, which also concerned a dispute between businesses, than the facts in the *Campbell* case, which involved an individual plaintiff. *Id.*

131. *Id.*


133. *Id.* slip op. at 7.

134. *Id.* slip op. at 7 n.3.

135. *Id.* slip op. at 7.


petitor, had engaged in unfair and deceptive practices in an effort to influence retail stores to allocate more shelf space to it. The court recognized that the Illinois Supreme Court had not addressed the "public effect" issue, but found that dicta in the supreme court decision in *Scott v. Association for Childbirth at Home, International* supported limiting liability under the Act to conduct that either deceives or exploits consumers.\(^{140}\) The *Jays Foods* court dismissed the significance of those Illinois cases which rejected a "public effect" requirement stating that "those cases have either involved individual consumer plaintiffs or conduct from which injury to consumers could be readily inferred."\(^{141}\) Moreover, the *Jays Foods* court correctly noted that no Illinois court had applied the Act to a dispute between two businesses who were not consumers of each others goods or services.\(^{142}\) Relying in part on the authority of *Newman-Green*, the *Jays Foods* court concluded that consumer injury was an essential element of any cause of action under the Act,\(^{143}\) and therefore dismissed the plaintiff's claim.\(^{144}\) Unlike *Newman-Green* and its progeny, however, the *Jays Foods* court suggested that a consumer plaintiff may not need to prove an injury other than to himself in order to pursue a claim under the Act.\(^{145}\)

In summary, courts analyzing the Illinois Act have taken one of four approaches to the "public effect" issue. The overwhelming majority of the federal courts and half of the state courts addressing the issue have adopted a "public effect" requirement. Most of the remaining courts have rejected such a requirement outright, while some have imposed it only when the plaintiff was a business and others have imposed it only when the plaintiff was not a consumer. A common element of most of these decisions, however, is the absence of any serious attempt to ascertain the legislative intent underlying the Act.

### III. An Analysis Of The Statutory Language Of The Illinois Consumer Fraud Act

While the terse legislative history of the Act's 1973 amendment adding a private right of action does not provide any insight into the legislative intent,\(^{146}\) the language of the Act itself reflects an intent that the Act apply to private wrongs.

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139. 88 Ill. 2d 279, 430 N.E.2d 1012 (1982).
140. 664 F. Supp. at 369-70. The dicta in *Scott* relied on by the *Jays Foods* court states that "purchasers of educational services may be as much in need of protection against unfair or deceptive practices in their advertising and sale as are purchasers of any other service." *Id.* (citing *Scott*, 88 Ill. 2d at 285, 430 N.E.2d at 1015).
142. *Id.* at 369.
143. *Id.* at 368.
144. *Id.* at 370.
145. *Id.* at 369.
146. See Illinois Senate Debate, 78th Illinois Gen. Assembly at 264-69 (June 30, 1973);
A. The Act's Language Supports its Application to Private Wrongs Sustained by Consumers

The language of the Act reflects a legislative intent to prohibit private as well as public wrongs. For example, the Act proscribes "unfair or deceptive acts or practices." This proscription suggests two kinds of prohibited conduct: (1) a practice, which is customary or habitual conduct; and, (2) an act, which is an isolated event. Any other interpretation renders the Act's use of the word "acts" superfluous. Furthermore, as the Tague court noted, the Act states in section 2 that the prohibited conduct includes "any deception, fraud, false pretense ...." Thus, the legislature apparently intended to outlaw any kind of deceptive or unfair conduct, whether private or public. Additionally, section 10a provides that any person who is damaged by "a violation" of the Act may sue. Considered together, section 2 and section 10a clearly indicate that one isolated act of deception or unfair conduct is sufficient to state a cause of action under the Act. Finally, as the Haroco court observed, section 7, which grants the Attorney General authority to file suit under the Act, expressly requires a finding that the proceeding is in the public interest, whereas section 10a, which creates a private right of action, contains no such language.

B. Reliance on the Act's Reference to the FTC Act to Impose a "Public Effect" Requirement is Misplaced

Almost every court that has imposed a "public effect" requirement has failed to focus on the language of the Act. An exception to this is the Evanston Motor court. In that case, the court relied upon a reference in the Illinois Act to the FTC Act. Yet a careful analysis of the FTC Act reference discloses that it does not support a "public effect" requirement.

The reference to the FTC Act is found in section 2 of the Illinois Act. That section describes the conduct prohibited by the Act and directs the courts to consider case law under section 5(a) of the FTC Act in interpreting

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149. Ill. Rev. Stat. ch. 121 1/2, para. 270a (1987). The statute provides that "[a]ny person who suffers damages as a result of a violation of this Act committed by another person may bring an action against that person." Id.
151. Id. at 1034; see Ill. Rev. Stat. ch. 121 1/2, para. 267 (1987).
Section 5(a) of the FTC Act describes three kinds of illegal conduct, using language which in crucial part was adopted verbatim by the Illinois legislature in drafting section 2 of the Illinois Act. Both Acts prohibit: “unfair methods of competition”; “unfair . . . acts or practices”; and “deceptive acts or practices.” It logically follows, as the Haroco court concluded, that the Illinois Act’s reference to the FTC Act merely ties the definitions of the Illinois Act’s underlying offenses to the definitions of the corresponding offenses contained in section 5(a) of the FTC Act.

Undoubtedly, the Illinois legislature’s motivation in referencing the FTC Act was its concern that the Illinois Act’s description of the prohibited conduct, particularly the term “unfair,” would be challenged as vague because the term “unfair” in the FTC Act had been severely criticized before the FTC established clear guidelines for applying the term. In fact, the term “unfair” in the Illinois Act was challenged as unconstitutionally vague in Scott v. Association for Childbirth At Home, International. Therein, the Illinois Supreme Court found that the legislature’s use of the term “unfair” was not vague precisely because of the Illinois Act’s reference to interpretations of the FTC Act and the existence of a well-developed body of law interpreting the term under the FTC Act. The Illinois Act’s reference to section 5(a) of the FTC Act reflects, therefore, a legislative intent to provide Illinois courts with guidelines for interpreting the statute’s rather vague proscription.

Based solely on this reference to the FTC Act, the Evanston Motor court inadvertently incorporated not only the contents of section 5(a) into the Illinois Act, but also the public interest requirement found in section 5(b). This occurred because the Evanston Motor court relied upon case law under the FTC Act without appreciating the differences between the Illinois Act and the FTC Act. Specifically, the court failed to recognize that section 5(b) of the FTC Act requires the FTC to make a finding that a proceeding is in the public interest before its commencement (a requirement also statutorily imposed upon the Illinois Attorney General in proceeding under the Illinois Act, but not imposed on persons pursuing a private right of action). This

154. The statute instructs the courts as follows:

In construing this section, consideration shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to Section 5(a) of the Federal Trade Commission Act.


156. Compare language of section 2 of Illinois Act, supra note 5, with language of section 5(a)(i) of the FTC Act, supra note 6.


159. 88 Ill. 2d 279, 430 N.E.2d 1012 (1982).

160. Id. at 290-91.
requirement obviously affects the kind of conduct that the FTC prosecutes, but it should not affect private actions under the Illinois Act because the Illinois Act references section 5(a) of the FTC Act not section 5(b).

Thus the FTC Act reference clearly does not justify adopting the public interest requirement in section 5(b) of the FTC Act in actions under the Illinois Act. Nevertheless, the FTC Act reference could serve as a basis for imposing a “public effect” requirement in actions under the Illinois Act if the prohibited conduct language of section 5(a) of the FTC Act has been interpreted to include such an element. That, however, is not the case.

C. Judicial Interpretations of the FTC Act’s Prohibited Conduct Language Do Not Contain a “Public Effect” Requirement

To determine whether the FTC Act reference has any relevance to the “public effect” issue, it is necessary to examine interpretations of the FTC Act’s prohibited conduct language to ascertain whether they contain a “public effect” element. This task is simplified by the existence of guidelines prepared by the FTC from a review of the numerous judicial decisions interpreting the words “deceptive” and “unfair.”

The guidelines for deceptive conduct provide that the FTC will find deception if there is “a representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances to the consumer’s detriment.” The corresponding guidelines for unfair acts or practices require a substantial consumer injury which is not offset by consumer or competitive benefits and which consumers reasonably could not have avoided. “Substantial” in this context refers to something other than trivial or speculative harms, although what otherwise might be considered trivial or speculative may become substantial if a large number of people are involved or the practice raises a significant risk of concrete harm. The FTC guidelines explain, however, that substantial harm generally “involves monetary harm, as when sellers coerce consumers into purchasing unwanted goods or services or when consumers buy defective goods or services on credit, but are unable to assert against the creditor claims or defenses arising from the transaction.” Additionally, unwarranted health or safety risks may be the basis for a finding of unfairness whereas emotional harm or other subjective kinds of harm generally will be insufficient grounds for such a finding. Notably, these guidelines do not require that the public be

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162. Letter and Companion Statement from Commissioners Pertschuk, Dixon, Clanton, Pitofsky, and Bailey to Senators Ford and Danforth (Dec. 17, 1980) (reprinted in Averitt, supra note 158, at 291 app.).
163. Id. at 291 app.
164. Id.
165. Id.
injured or affected by the wrongful conduct before it is considered an unfair or deceptive practice violative of the FTC Act.

There are no guidelines for unfair methods of competition, the third category of FTC Act violations. The FTC has stated, however, that unfair methods of competition are identified by the FTC by reference to the purposes, policies and spirit of the other antitrust laws as well as the FTC Act.166 A public injury or an effect on consumers generally is not an element of this kind of FTC Act violation either. Although an effect on competition (which is a form of "public effect" according to "Evanston Motor") is an element of some antitrust violations, it is not an element of every such violation.167 Moreover, the FTC can establish unfair competition without proof that the antitrust laws have been violated provided that the wrongful conduct is likely to develop into an antitrust violation.168 Thus, there is no "public effect" element inherent in the definitions of "unfair or deceptive acts or practices" or "unfair methods of competition" as those terms are used in the FTC Act.

This conclusion is supported by language in section 5(b) of the FTC Act. Section 5(b) provides that the FTC must make two findings before instituting a proceeding: (1) that it has reason to believe that any unfair method of competition or unfair or deceptive act or practice has been, or is being, committed; and, (2) that a proceeding would be in the public interest.169 The second part of this two-step process would be unnecessary if public interest was inherent in the definition of unfair methods of competition and unfair or deceptive acts.

Although the definitions of the conduct banned by the FTC Act do not include the "public effect" that many courts have read into the Illinois Act, the FTC guidelines for deceptive and unfair practices discussed above do envision some "consumer impact." Deceptive conduct is an act or practice likely to mislead a reasonable consumer to his detriment, and an unfair practice requires a substantial consumer injury. Accordingly, a consumer suing under the Illinois Act need prove only injury to himself, unless an unfair practice is alleged and the harm is trivial or speculative and unlikely to lead to concrete harm. On the other hand, a non-consumer plaintiff always must show something more than injury to itself. The non-consumer plaintiff must demonstrate some consumer involvement to support an allegation of deceptive conduct (i.e., that consumers are likely to be misled), and substantial consumer injury to support an allegation of an unfair practice. Thus, while a "public effect" is not an element of a cause of action

166. See Averitt, supra note 158, at 289 n.4 app.
167. See infra notes 199-202 and accompanying text.
under the Act, a non-consumer plaintiff must show some "consumer impact" in addition to injury to itself. 170

Even in cases brought by non-consumers, this "consumer impact" requirement is theoretically different than the requirements of a public injury or an effect on consumers generally as discussed in the case law. Unless an unfair practice is alleged and the harm is trivial or speculative and not likely to lead to concrete harm, more than one consumer does not have to be involved. As a practical matter, however, in cases involving disputes between non-consumer businesses (the most likely non-consumer plaintiffs), conduct which affects one consumer undoubtedly will affect a number of consumers. For example, if a business made untrue disparaging comments about a competitor's product in its advertisements, all interested consumers, as well as the competitor, would be affected because the consumers' free choice would be diminished by the false information. 171

Applying the foregoing analysis, the courts deciding Century Universal, Jays Foods, and even Newman-Green, correctly concluded that the non-consumer business plaintiffs in those cases had not stated a cause of action under the Act because the defendants' conduct did not implicate consumer protection concerns. Unfortunately, these courts reached the right conclusion without properly analyzing the Act. 172 Moreover, the Newman-Green court

170. Since this "consumer impact" requirement arises from interpretations of unfair or deceptive acts under the FTC Act, it would seem that the determination as to who is or is not a consumer for this purpose should be governed by interpretations of the word "consumer" under the FTC Act rather than by its definition in the Illinois Act. (The FTC Act does not contain a definition of the term "consumer.").

One would expect that a consumer under the FTC Act would also be a consumer under the Illinois Act, and that is undoubtedly true in most situations. A borrower, however, does not appear to be included in the Illinois Act's definition of consumer whereas the FTC apparently views borrowers as consumers since it has promulgated regulations against "debt collection deception" pursuant to its authority to prosecute deceptive practices under the FTC Act. See 26 C.F.R. § 237 (1988). The regulations do not appear to be limited to consumer credit situations. Since the FTC defines deceptive conduct as conduct likely to deceive a reasonable consumer, these regulations suggest that the FTC considers all borrowers to be consumers. Thus, borrowers suing under the Illinois Act who prove an injury to themselves would not have to demonstrate any further consumer impact.

If the foregoing analysis is incorrect and borrowers should not be treated as consumers in this respect, then Haroco must be reevaluated since the plaintiffs therein were commercial borrowers and the court did not consider whether there was any consumer impact. Haroco, Inc. v. American Nat'l Bank & Trust Co., 647 F. Supp. 1034 (N.D. Ill. 1986). Haroco nevertheless may be decided correctly if the Jays Foods court is right that the plaintiffs in Haroco were treated the same by the defendant bank as consumer borrowers. Jays Foods, Inc. v. Frito-Lay, Inc., 664 F. Supp. 364, 369 (N.D. Ill. 1987).

171. The M & W Gear case involved this type of conduct. See supra notes 40-46 and accompanying text.

172. Jays Foods is the only case recognizing that the concept of consumer injury developed from attempts to interpret the term "unfair" under the FTC Act. The Jays Foods court failed, however, to appreciate the relevance of this fact in interpreting the Illinois Act. The court instead relied strictly on case law in holding that consumer injury is an independent element of every claim under the Act. Jays Foods, Inc. v. Frito-Lay, Inc., 664 F. Supp. at 366-72.
THE PUBLIC EFFECT REQUIREMENT

failed to limit its holding to cases brought by non-consumer plaintiffs. As a result, the *Newman-Green* court’s broad requirement of “an effect on consumers generally” was applied erroneously to situations involving consumer plaintiffs.

Requiring non-consumer businesses to allege injury to someone other than themselves (i.e., consumers) when suing for deceptive or unfair conduct under the Act is not inconsistent with the express intent of the Act to protect businessmen. This is true because businesses can recover damages resulting from other businesses deceiving or unfairly treating consumers. Furthermore, the Act’s prohibition against unfair competition, which was added to the Act at the same time as the language regarding the protection of businessmen, more directly benefits businesses than consumers.

**D. The Statutory Language of the Illinois Act Does Not Support a Distinction Between Individual and Business Consumers**

While the Act’s language supports a distinction between non-consumer plaintiffs and consumer plaintiffs, the distinction made by some courts between individual consumers and businesses who were acting in a consumer capacity in the relevant transaction is not justified by the statutory language. Section 10a allows “any person” to sue under the Act and section 1(c) defines a person to include any natural person or business entity. Furthermore, section 1(e) defines a consumer as “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.” Businesses purchase certain supplies and services for their own use rather than for resale. Consequently, a business can be a consumer under the Act, and no justification exists for treating business consumers differently than individual consumers.

**IV. JUDICIAL INTERPRETATIONS OF CONSUMER FRAUD STATUTES IN OTHER STATES**

A natural place to look for additional insight into the “public effect” issue is case law interpreting consumer fraud statutes in other states. Unfortunately, a review of such cases is not helpful. While most states have

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173. The *Newman-Green* court stated that the language of the 1973 amendment to the Act, which refers to the protection of businessmen, grants “businessmen standing to sue to redress competitive injury they suffer when other businessmen deceive customers.” *Newman-Green, Inc. v. Alfonzo-Lorrain*, 590 F. Supp. 1083, 1085 (N.D. Ill. 1984). Actually, a business which has been injured by unfair competition or unfair acts or practices does not have to demonstrate consumer deception. Deception is an element of the cause of action only if the alleged violation is a deceptive act or practice, and even then the conduct simply needs to be conduct likely to deceive a reasonable consumer.

174. ILL. REV. STAT. ch. 121 1/2, para. 270a(a) (1987).

175. ILL. REV. STAT. ch. 121 1/2, para. 261(e) (1987).

176. ILL. REV. STAT. ch. 121 1/2, para. 261(e) (1987).
some form of consumer fraud legislation and most allow private actions,\textsuperscript{177} the courts in only a handful of states have addressed the "public effect" question. Those states whose courts have analyzed this issue have imposed a public interest requirement, but the opinions either contain unpersuasive reasoning or concern a statute significantly different than the Illinois statute.

\textbf{A. Washington and Connecticut}

The courts of Washington and Connecticut have addressed this issue more frequently than the courts of any other state except Illinois. While the Washington courts consistently have held that only conduct that affects the public interest is actionable under the Washington Consumer Protection Act,\textsuperscript{178} these cases do not provide any guidance in analyzing the Illinois Act because the Washington statute, unlike the Illinois Act, explicitly provides that injury to the public interest is an element of a violation of the statute. The Washington statute states:

\begin{quote}
It is . . . the intent of the legislature that this act shall not be construed to prohibit acts or practices which . . . are not injurious to the public interest . . . .\textsuperscript{179}
\end{quote}

Although the Connecticut statute does not contain similar language, the Connecticut Supreme Court read a public interest requirement into the statute in \textit{Ivey, Barnum \& O'Mara v. Indian Harbor Properties, Inc.},\textsuperscript{180} using the same rationale that the United States District Court for the Northern District of Illinois used in \textit{Evanston Motor}.\textsuperscript{181} The Connecticut statute, like the Illinois statute, directs the judiciary to be guided in interpreting the statute by interpretations of the FTC Act.\textsuperscript{182} The \textit{Ivey} court, like the \textit{Evanston

\begin{notes}
\textsuperscript{178} \textit{WASH. REV. CODE ANN.} § 19.86.020 to 19.86.920 (1989).
\textsuperscript{179} Id. at § 19.86.920.
Hawaii's consumer fraud statute also contains an explicit, although contrary, reference to a public interest requirement. Formerly, it stated that:

\begin{quote}
[N]o showing that the proceeding or suit would be in the public interest (as these terms are interpreted under section 5(b) of the Federal Trade Commission Act) is necessary when the party against whom the proceeding or suit is brought is a merchant.
\end{quote}

\textit{HAW. REV. STAT.} § 480-13(a)(1) (1985). Currently, the statute states:

\begin{quote}
[N]o showing that the proceeding or suit would be in the public interest (as these terms are interpreted under section 5(b) of the Federal Trade Commission Act) is necessary in any action brought under this section.
\end{quote}

\textit{HAW. REV. STAT.} § 480-2(c) (Supp. 1987). Interestingly, this provision applies to actions by the Attorney General or the Director of the Office of Consumer Protection as well as private actions. Because of the explicit language regarding a public interest requirement, the Hawaii courts, unlike the Connecticut courts, have not debated the issue.

\textsuperscript{180} 190 Conn. 528, 461 A.2d 1369 (1983).
\textsuperscript{181} See supra notes 58-65 and accompanying text.
\textsuperscript{182} \textit{CONN. GEN. STAT.} § 42-110a-9 (1987).
\end{notes}
Motor court, reasoned therefrom that public interest must be a requirement under the Connecticut statute since it was required under the FTC Act. The Ivey decision is flawed in the same respects as the Evanston Motor opinion.

Like the Illinois statute, the Connecticut statute refers to section 5(a) of the FTC Act, not section 5(b) which contains the public interest requirement. Thus, Connecticut case law does not provide any helpful insight into this issue.

The Connecticut legislature's interpretation of its own statute, however, is enlightening. The Connecticut legislature responded swiftly to what it viewed as the Ivey court's misinterpretation of the Connecticut statute by passing an amendment the following year adding language to the statute expressly stating that public interest is not required in suits thereunder. The provision added by the 1984 amendment states that "[p]roof of public interest or public injury shall not be required in any action brought under this section." Moreover, the legislative history of the amendment reflects that it was not intended to change the statute, but merely to clarify that there was never a public interest requirement under the statute.

B. South Carolina, Georgia and Massachusetts

Legislatures in other states (including Illinois) have not been so quick to respond to apparent misinterpretations of their consumer fraud statutes. The appellate courts of South Carolina, Georgia, and Massachusetts have also relied upon the reference in their respective statutes to the FTC Act and the FTC Act's public interest requirement to judicially impose a "public effect" requirement in actions under their statutes. These decisions are as unper-

183. Id. at § 42-110b(h).
185. See Wilson v. Fireman's Fund Ins. Co., 40 Conn. Supp. 336, 499 A.2d 81 (1985). The Connecticut Superior Court held that the 1984 amendment to the Connecticut Unfair Trade Practices Act applied retroactively because the legislature intended it to clarify rather than to substantively change the law. As support for its holding, the court cited the following statement by Representative Maurice B. Mosley: "Mr. Speaker, this bill basically makes clear that there's no requirement for proving a public interest or injury . . . under the Unfair Trade Practices Act." Id. at 340, 499 A.2d at 84 (quoting 27 H.R. Proc., Pt. 19, 1984 Sess., p. 6769).
186. See, e.g., Zeeman v. Black, 156 Ga. App. 82, 273 S.E.2d 910 (1980) (purchaser of house could not maintain cause of action against seller under Georgia Fair Business Practice Act because sale did not occur in course of defendant's business; purchaser also could not sue realtor under statute because transaction had no impact on consumer marketplace); Newton v. Moffie, 13 Mass. App. Ct. 462, 464-65, 434 N.E. 2d 656, 658-60 (1982) (private transactions between partners in partnership do not fall under Massachusetts Consumer Fraud Statute because deception did not occur in conduct of trade or commerce and did not effect public interest); Noack Enter. v. Country Corner Interiors, 290 S.C. 475, 351 S.E.2d 347 (S.C. Ct. App. 1986) (buyer of business was not able to bring cause of action based on fraud against seller because transaction had no impact on public interest).

The Newton court actually imposed a public interest requirement in dicta. To reverse the judgment favoring the plaintiff's Massachusetts consumer fraud claim, the Newton court first
suasive in this respect as Ivey and Evanston Motor. The consumer fraud statutes of each of these three states, like the Illinois statute, refer to section 5(a), not section 5(b), of the FTC Act. Furthermore, the statutes explicitly require a finding of public interest in actions instituted by the appropriate public official, while omitting any mention of public interest in the section granting a private right of action.

None of the above courts relied solely on the reference to the FTC Act to find a public interest requirement. Each advanced additional arguments, but these arguments also lack merit. The Massachusetts Appeals Court and the South Carolina Court of Appeals focused on language in their statutes, also found in the Illinois Act, that defines trade or commerce (in the conduct of which deceptive or unfair acts are prohibited) to include "any trade or commerce directly or indirectly affecting the people of this State." Deriving a public interest requirement from this language is unwarranted. The placement of such language in the definition of "trade or commerce" rather than in the description of the prohibited conduct clearly indicates that it is the trade or commerce, not the wrongful conduct, that must affect the people of the respective state. In fact, similar language has been construed under Illinois law to require that the trade or commerce, in which the violation of the Act occurred, have some connection with Illinois rather than only with other states. This language, therefore, is merely a territorial limitation to ensure that the courts of the respective state do not interfere in the affairs of other states.

questioned whether the deception occurred in the conduct of trade or commerce. In the end, however, the court held that even if the deception occurred in the conduct of trade or commerce, the statute did not apply to transactions between members of a single legal entity. The court then discussed the public interest issue as an additional reason for its decision. In this regard, the court stated that "[a]ssuming . . . that the effect of the questioned conduct on the public interest is a relevant consideration," nothing in the record indicated that the alleged wrongful conduct had any detrimental effect on the public interest. Newton v. Moffie, 13 Mass. App. Ct. at 467, 434 N.E.2d at 659-60. Interestingly, the South Carolina Court of Appeals concluded in Noack that Massachusetts did not require an effect on the public interest under its statute, citing a case in which the defendant did not raise the issue. Noack Enter. v. Country Corner Interiors, 290 S.C. at 480-81, 351 S.E.2d at 351.


190. Seaboard Seed Co. v. Bemis Co., 632 F. Supp. 1133 (N.D. Ill. 1986). The defendant in Seaboard also argued that the court should grant summary judgment on the Consumer Fraud Act claim because the alleged wrongful conduct had not inflicted a "public injury." The Seaboard court stated that it did not need to reach the public injury issue because it could dispose of the claim based on the fact that the alleged conduct did not occur in trade or commerce which impacted on Illinois consumers. Id. at 1140.
As an additional ground for imposing a “public effect” requirement, the South Carolina Court of Appeals relied on the requirement in its statute that the clerk of court report to the Attorney General all private suits brought under the statute. The court construed that requirement to reflect a legislative intent that private actions were to serve the same objective as actions instituted by the Attorney General (i.e., to redress wrongs affecting the public interest). In contrast to the South Carolina statute, the Illinois Act states that the plaintiff “may” report private actions to the Attorney General. In any event, it seems more likely that the purpose of these reporting provisions is to keep the Attorney General’s office advised of statutory violations so it can identify egregious or repeat offenders whose activities the Attorney General should investigate.

The Georgia Court of Appeals asserted yet another basis for imposing a public interest requirement. Incorrectly assuming that public interest is required in actions under section 4 of the Clayton Act, which provides a private cause of action for antitrust violations, the Georgia court analogized the Georgia consumer fraud statute to section 4. The court’s misunderstanding regarding the existence of a public interest requirement under section 4 arose from language in a federal decision which addressed an entirely different issue. The actual issue in the federal case was the applicability of an arbitration clause in a collective bargaining agreement to antitrust disputes. It was in this context

191. Noack Enter. v. Country Corner Interiors, 290 S.C. at 479, 351 S.E.2d at 349 (court found clear purpose in language of statute which showed the Unfair Trade Practices Act was aimed only at trade and commerce which had impact on public).

192. Specifically, the Act states: “[u]pon commencement of any action brought under this Section the plaintiff may mail a copy of the complaint . . . to the Attorney General . . . .” Ill. Rev. Stat. ch. 121 1/2, para. 270a(d) (1987) (emphasis added).

193. In Noack, the South Carolina Court of Appeals also asserted that, absent a public interest requirement, the Act would apply to a person selling his home to another individual. 290 S.C. at 479, 351 S.E.2d at 349. This is not a sound argument. If the court did impose a public interest requirement, it still could find that the statute did not apply to an individual’s sale of his own home on the ground that the statute applies only to acts committed in the course of the defendant’s business.

Not surprisingly, other courts have addressed whether the respective consumer fraud statute applied to a sale of a home by its owner without addressing the public effect issue. Compare Young v. Joyce, 351 A.2d 857, 860 (Del. 1975) (holding the statute does not apply to such a sale) with Klotz v. Underwood, 563 F. Supp. 335, 337 (N.D. Tenn. 1982) (reaching the opposite conclusion). The Noack court is not alone, however, in assuming that the two issues are necessarily intertwined. See DiBernardo v. Mosley, 206 N.J. Super. 371, 373, 502 A.2d 1166, 1168 (1986).


197. Id. at 163.
that the federal court noted that actions pursuant to section 4 are "designed to further the broad public interest transcending the private objectives of the parties." 108

The Georgia court misinterpreted this language as indicating that public interest was an element under section 4 and reasoned that it should also be an element under the Georgia statute. Had the Georgia court more carefully examined the case law under section 4 of the Clayton Act, however, it would have discovered that public interest is not an element of a cause of action under section 4. In Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 199 the United States Supreme Court rejected the argument that a public injury was a separate element of an action under section 4. The plaintiff in Radiant Burners had alleged that the defendant had violated section 1 of the Sherman Act. 200 The Seventh Circuit affirmed the lower court's dismissal of the claim holding that absent a per se violation of the Sherman Act, a person suing for a violation of that Act under section 4 of the Clayton Act must allege a public injury. The Supreme Court reversed finding that a plaintiff in a private antitrust suit had to prove only a violation of the antitrust laws and that he was damaged thereby. In this regard the court reasoned that the Sherman Act outlawed "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce" without any mention of a public injury. 201 The court therefore concluded that the judiciary may not expand "the criteria of prohibitions" prescribed by Congress. 202

198. Id.
199. 364 U.S. 656, 660 (1961) (plaintiff alleged defendant violated section 1 of Sherman Act; Seventh Circuit affirmed lower court's dismissal of a claim holding that absent a per se violation of Sherman Act, suit for a violation of the Sherman Act under section 4 of Clayton Act must allege public injury).
201. Radiant Burners, 364 U.S. at 660 (quoting Standard Oil Co. v. United States, 221 U.S. 1 (1910)).

Apparently, there is some confusion about whether the public injury requirement has been eliminated only in cases alleging per se violations of the antitrust laws. See 1984 A.B.A. ANTITRUST SEC., ANTITRUST LAW DEVELOPMENTS 379, 387 n.29 (2d ed.). Although the Radiant Burners Court found the alleged conduct to be a per se violation of the Sherman Act, the Court used language that clearly reflected its belief that a plaintiff suing under section 4 of the Clayton Act who proves any antitrust violation need not also prove a public injury. As one astute commentator explained:

The public injury issue may reflect confusion concerning the definition of the substantive offense. A harmful effect upon the economy is sometimes an essential element of the antitrust violation. In that event, the private plaintiff—as well as the government plaintiff—must prove it. But where defendant's conduct is illegal without proof of market effects, the government would prevail merely by proving the conduct. The private plaintiff should also prevail in these circumstances—subject, of course, to proving direct injury to himself.

2 P. AREEDA & D. TURNER, ANTITRUST LAW § 331 (1978) (footnote omitted).
202. Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. at 660. The Court's exact wording was:

By §1, Congress has made illegal: "Every contract, combination . . . or conspiracy,
C. New York

A federal court interpreting New York law also relied upon the FTC Act's public interest requirement to impose such a requirement under the New York consumer fraud statute even though the New York statute does not refer to the FTC Act. The court reasoned that the New York statute was modeled substantially after the FTC Act and the New York courts had relied upon interpretations of the FTC Act in defining deceptive practices under the New York statute. The court's reasoning is faulty because it failed to consider the importance of a major difference between the two statutes: the New York statute provides for a private right of action whereas the FTC Act does not.

The same court also argued that applying the New York statute to a private transaction would effectively nullify the essential requirements for fraud in commercial dealings. The court refused to accept this result where the legislature has not explicitly expressed its intent to effect such a change. Yet the court failed to explain why it had no problem imposing a public interest requirement when the legislature had not expressed, explicitly or implicitly, its intent that such a requirement exist.

Courts in Illinois and elsewhere should follow the example of the Supreme Court in *Radiant Burners* and refrain from expanding the "criteria of the prohibitions" found in their consumer fraud statutes. It should be suffi-

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in restraint of trade or commerce among the several states... Congress having thus prescribed the criteria of the prohibitions, the courts may not expand them. Therefore, to state a claim upon which relief can be granted under that section, allegations adequate to show a violation and, in a private treble damage action, that plaintiff was damaged thereby are all the law requires.

*Id.*


204. *Id.* at 751-52.

205. The New York consumer protection statute provides:

In addition to the right of action granted to the attorney general pursuant to this section, any person who has been injured by reason of any violation of this section may bring an action in his name...

N.Y. GEN. BUS. LAW § 349(h) (McKinney 1988).


207. *Id.*


The Georgia and South Carolina decisions, on the other hand, indicate that a defendant's
cient for a person suing thereunder to establish that the defendant has engaged in some prohibited conduct and that the plaintiff has been damaged thereby.209

V. CONCLUSION

Most of the case law holding that the Illinois Consumer Fraud Act does not apply to private wrongs is seriously flawed. The overwhelming majority of the cases simply rely on earlier decisions without analyzing the reasoning of those cases or examining the language of the Act. The Act is devoid of any suggestion that it is inapplicable to private wrongs. Instead, its language suggests the contrary. The only language relied upon by any of the courts imposing a "public effect" requirement is the Act's reference to section 5(a) of the FTC Act. That reference merely ties the definition of the conduct prohibited by the Illinois Act to judicial interpretations of identical language found in section 5(a) of the FTC Act. Interpretations of section 5(a) do not contain a "public effect" element although they do support requiring non-consumer plaintiffs to prove some "consumer impact." While section 5(b) of the FTC Act requires that a proceeding thereunder be in the public interest, the Illinois Act refers to section 5(a) not section 5(b) of the FTC Act. Moreover, the section of the Illinois Act empowering the Attorney General to bring suit under the Act similarly requires a finding of public interest, but such language is conspicuously absent from the section providing for a private right of action. Finally, none of the decisions imposing a "public effect" requirement under consumer fraud statutes in other states contain persuasive reasoning applicable to the Illinois Act.

It is time for the Illinois Supreme Court to accept certiorari in a case involving the "public effect" issue and end the inconsistent judicial treatment of claims brought under the Act.210 The supreme court should implement conduct meets the public interest requirement if it has the potential for repetition. See Zeeman v. Black, 156 Ga. App. 82, 87, 273 S.E.2d 910, 915 (1980); Noack Enter. v. Country Corner Interiors, 290 S.C. 475, 478, 351 S.E.2d 347, 350-51 (S.C. Ct. App. 1986). The Washington courts consider a number of factors including the potential for repetition and whether the conduct is part of a pattern. See Hangman Ridge Training v. Safeco Title Ins., 105 Wash. 2d 778, 784, 719 P.2d 531, 537 (1986). (The Massachusetts Appeals Court did not discuss how the public interest requirement could be met. Newton v. Moffie, 13 Mass. App. Ct. 462, 434 N.E.2d 656 (1982)).

In contrast to the other Illinois cases, the United States District Court of the Northern District of Illinois did suggest in Hangsteffer v. Inso, No. 86 C 1022 (N.D. Ill. May 14, 1987), that a potential injury to consumers may satisfy any "public effect" requirement.

209. The United States District Court for Colorado also addressed the "public effect" issue in United States Welding, Inc. v. Burroughs Corp., 615 F. Supp. 554 (D. Colo. 1985). The court held therein that the Colorado Consumer Protection Act does not apply to cases "where the underlying transaction is commercial in nature, between two business on equal footing, and where there is no public injury." Id. at 554.

the broad language of the Act by ruling that it applies to private wrongs except when the plaintiff is a non-consumer and no consumer impact is shown. Any distinction between individual and business consumer plaintiffs should be rejected outright. Alternatively, the Illinois legislature should follow the lead of the Connecticut legislature and clarify the Act's scope with an amendment. Until either the Illinois Supreme Court or legislature takes action in this regard, numerous marketplace wrongs prohibited by the Act will go unremedied.