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ILLINOIS SUPREME COURT REVERSES CERTIFICATION OF NATIONWIDE CONSUMER FRAUD CLASS ACTION AND SETS POTENTIALLY INSURMOUNTABLE HURDLE TO THE CERTIFICATION OF STATE LAW NATIONWIDE CLASS ACTIONS

In a long-awaited decision, the Illinois Supreme Court unanimously reversed certification of a nationwide consumer fraud class action, holding that the law of the plaintiff's place of injury — not the law of the defendant's place of business — applied to the class members' claims, and that their claims under the Illinois Consumer Fraud Act were not actionable because the challenged ads were puffery, and, thus, "not a 'deceptive act' within the purview of the Act." *See Barbara's Sales, Inc. v. Intel Corp.*, 2007 Ill. LEXIS 1698 (Nov. 29, 2007). Following on the heels of its earlier opinion in *Avery v. State Farm Mutual Auto. Ins. Co.*, 216 Ill. 2d 100 (2005), the Court's latest decision is the most recent in a trend among both state and federal courts refusing to certify nationwide classes due in part to the conflicts that arise from the substantial differences in the applicable state laws.

The action was brought by Illinois and Missouri residents on behalf of a putative nationwide class of purchasers of computers containing Intel's Pentium 4 ("P4") processors. Plaintiffs alleged that Intel's "explicit and implicit representations as to [the P4's] advancement in performance over [Intel's older] Pentium III [processor] and the processors of a competitor manufacturer" were false and deceptive in violation of Illinois' and California's unfair competition and consumer fraud statutes. 2007 Ill. LEXIS 1698, at *3. In particular, plaintiffs alleged that Intel's public statements touting its P4 as the "highest performance processor" were false, and that Intel had deceptively "conditioned the consumer, through its marketing and naming practices, to [falsely] believe that each of its high-performance processors is superior in speed and performance to the previous model." *Id.* at *5, *7. Documents and testimony adduced during discovery reflected that Intel "intended to communicate that [P4 is] better than Pentium III." *Id.* at *10.

Applying Illinois' choice-of-law principles, which follow the Restatement (2d) of Conflict of Laws, the trial court held that Illinois law applied to plaintiffs' claims. 2007 Ill. LEXIS 1698, at *14. It held, however, that Illinois law could not be applied to a nationwide class because, as the Illinois Supreme Court held in *Avery*, Illinois' Consumer Fraud Act did not apply to conduct outside of Illinois. *Id.* Accordingly, the trial court certified a class comprised only of consumers who either lived in or purchased a computer in Illinois. The Appellate Court, applying the Restatement of Conflict of Laws, reversed the trial court's order and held that California law applied nationwide, primarily on the ground that California was "the principal place of business of Intel and the place where the conduct leading to the injury occurred almost exclusively." 367 Ill. App. 3d 1013, 1019.

On appeal, the Illinois Supreme Court agreed with the parties that the "substantial differences in the [consumer fraud] laws of the 50 states" required the court to conduct a choice-of-law analysis. 2007 Ill. LEXIS 1698, at *19. Applying the Restatement's "most significant relationship" test, the Court considered California's and Illinois' respective relationships to plaintiffs' consumer fraud claims. *Id.* at *23. First, the Court considered the states' "relevant policies" and noted that, while both California and Illinois have an interest in protecting consumers (*id.* at *26), Illinois' consumer fraud statute applies only to transactions that take place inside Illinois, and, thus, Illinois' policy interest "would be to apply Illinois law to the claims of Illinois consumers" only. *Id.* at *27. The Court concluded that California's interests in protecting consumers would not suffer if its laws were not applied nationwide, particularly where "California has no interest in extending its laws to non-citizens and to actions

that occurred outside of California," and where, because a similar class action was pending in California state court, California would have the opportunity "to decide this issue under its own law." *Id*. The Court expressly rejected the Appellate Court's adoption of a "one forum with one result" approach, noting that applying a state's law to "a transaction with little or no relationship to the forum" raises due process concerns. *Id*. at *29-30 (quoting *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821-23 (1985)).

The Court then examined the factors identified in Section 148 of the Restatement "because [Section 148] is applied [most] precisely to claims based on false representations." 2007 Ill. LEXIS 1698, at *32. In particular, the Court considered where the plaintiffs received and acted in reliance on Intel's marketing statements, where Intel made the statements, the various residences and places of business of the parties, and where the computers at issue were situated at the time of the purchase. *Id*. The Court discounted the fact that Intel was located in California, again relying on the Restatement's commentary that "when the loss is pecuniary, ... residence and place of business of the plaintiff are more important than are similar contacts on the part of the defendant." *Id*. at *34 (quoting RESTAT. (2D) OF CONFLICT OF LAWS § 148, cmt. i). On balance, the Court found that the relevant contacts were most significant in Illinois and Missouri, the states of the named plaintiffs' residences and where the plaintiffs purchased their computers. The Court also relied on the Restatement's rule that "[if] any of two of [Section 148's enumerated] contacts, apart from the defendant's place of business, are located wholly in a single state, this will usually be the state of the applicable laws," and concluded that numerous of the named plaintiffs' contacts were in Illinois and Missouri, not California. *Id*. at *35-36. In concluding that Illinois had the most significant relationship to the plaintiffs and, thus, that Illinois law applied to plaintiffs' claims, the Court expressly rejected defendants' argument that California law should apply simply "because Intel's representation emanated from [California]." *Id*. at *37. The Court reasoned that plaintiffs' argument was "indistinguishable from our proclamation in *Avery*, where we stated, 'The appellate court's conclusion that a scheme to defraud was 'disseminated' from [a defendant's] headquarters is [an] insufficient'" basis for applying the law of the defendant's home state. *Id*. at *39 (quoting *Avery v. State Farm Mutual Auto. Ins. Co*., 216 Ill. 2d 100, 189 (2005)).

After agreeing with the trial court that the class could extend only to Illinois consumers (because, as the Court previously held in *Avery*, the Illinois consumer fraud statute applies only to transactions that occur "primarily" in Illinois, 2007 Ill. LEXIS 1698, at *40), the Court turned to the trial court's class certification order. Concluding that the order was erroneous because plaintiffs could not satisfy the statute's "deceptive act" requirement, the Court held that Intel's "implicit representation" that P4 processors were "the best and the fastest on the market" "is nothing more than puffery." *Id*. at *42. Because such "puffing" represents "meaningless superlatives that no reasonable person would take seriously, [such a statement] is not actionable as fraud." *Id*. (quoting *Speakers of Sport, Inc. v. Proserv, Inc*., 178 F.3d 862, 866 (7th Cir. 1999)). Among the numerous alleged misrepresentations plaintiffs alleged, the only statement communicated to the entire class was "Pentium 4." Because the P4 name "is indistinguishable from the use of the term 'best,'" the Court found "the implicit representation inherent in the name Pentium 4 is mere puffery." *Id*. at *44. The Court also found that other alleged misrepresentations relied upon by plaintiffs were never seen by the plaintiffs; thus, these statements were not actionable because the Illinois consumer fraud statute requires that "every consumer . . . actually saw and was deceived by the statements in question." *Id*. at *47.

The *Barbara's Sales* opinion rejects the most recent strategy employed by plaintiff class action counsel to obtain nationwide class action status in which they argue that the consumer protection law of the defendant's state applies to the claims of all class members nationwide, regardless of the state in which the products were purchased or in which the class member was allegedly misled. This strategy evolved in response to a series of decisions holding that differences among the 50 states' consumer protection statutes precluded certification of a nationwide class. Although at least one federal district court recently has certified a nationwide class by

applying the law of the defendant's home state to each plaintiff's claim (*see In re St. Jude Med., Inc.*, 2006 U.S. Dist. LEXIS 74797 (D. Minn. Oct. 13, 2006), *appeal pending*, No. 06-3860, 8th Cir.), the overwhelming majority of courts in the past five years have denied certification of nationwide consumer fraud classes on the grounds that there were material differences between the states' applicable laws, that a single state's law could not be applied, and that individual issues predominated — *e.g.*, *In re Bridgestone/Firestone Inc.*, 288 F.3d 1012 (7th Cir. 2002); *Lantz v. Am. Honda Motor Co.*, 2007 U.S. Dist. LEXIS 34948 (N.D. Ill. May 14, 2007); *In re Worldcom, Inc.*, 343 B.R. 412 (Bankr. S.D.N.Y. 2006); *Int'l Union of Operating Eng'rs Local No. 68 Welfare Fund v. Merck & Co., Inc.*, 929 A.2d 1076 (N.J. 2007) — decisions with which *Barbara's Sales* is fully in accord.

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