No. 3-21-0404

IN THE APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

Austin Casey III,	)	Appeal from the Circuit Court
Plaintiff,	)	of Will County
v.	)	Trial Court No.: 20 CH 645
Rides Unlimited Chicago, Inc.,	)	Trial judge: Hon. John Anderson
Defendant.	)	Date of Notice of Appeal: 08/27/21
	)	Date of Judgment: 08/25/21
	)	Date of Postjudgment Motion
	)	Order: N/A
	)	Supreme Court Rule conferring
	)	jurisdiction: 303(a)

BRIEF *AMICI CURIAE* OF THE NATIONAL ASSOCIATION OF CONSUMER ADVOCATES AND ILLINOIS TRIAL LAWYERS ASSOCIATION

Patrick D. Austermuehle (patrick@l-a.law)
Peter S. Lubin (peter@l-a.law)
LUBIN AUSTERMUEHLE, P.C. (#63335)
17W220 22nd Street, Suite 410
Oakbrook Terrace, Illinois 60181
630-333-0333

Counsel for *Amici Curiae*

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INTEREST OF THE *AMICI CURIAE*

The National Association of Consumer Advocates ("NACA") is a nonprofit corporation whose members are lawyers, law professors, and students practicing or studying consumer-protection law. NACA's mission is to promote justice for consumers through information sharing among consumer advocates and to serve as a voice for its members and consumers in the struggle to curb unfair and oppressive business practices.

The Illinois Trial Lawyers Association ("ITLA") is a statewide organization whose members focus their practices in representing injured consumers and workers. Founded in 1952, the organization has more than 2,000 members. ITLA's principles and mission are simple: to achieve and maintain high standards of professional ethics, competency and demeanor in the bench and bar; to uphold the Constitutions of the United States of America and the State of Illinois; to secure and protect the rights of those injured in their persons or civil rights; to defend trial by jury and the adversarial system of justice; to promote fair, prompt and efficient administration of justice; and to educate and train in the art of advocacy.

ITLA and NACA offer their experience and perspective as *amici curiae* to assist this Court in the resolution of the important access to justice issues raised by this appeal regarding ensuring that private attorney general actions to protect important consumer rights are encouraged. ITLA and NACA, as *amici curiae*, urge this Court to reverse the Circuit Court's improper fee award to Plaintiff's counsel—where the Court arbitrarily reduced the fee awarded to Plaintiff's counsel based on "eyeballing" and "proportionality"—and issue an opinion which formally adopts the

framework set out by the Supreme Court in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), and which recognizes the importance of fee-shifting in individual consumer claims.

Automobiles are often consumers most substantial purchase, and it is very difficult to attract competent counsel if courts routinely treat these cases as if they are small claims matters where counsel cannot be assured of being paid fairly for the efforts taken on a contingency basis with substantial financial risk. As to individual (non-class action) consumer fraud claims, only a relatively small number of lawyers practice in this area, given the complexity of the cases and the limited actual damages available in a typical individual consumer fraud matter. It will be difficult to attract more "private attorneys general" to assist individual consumers to vindicate their rights, or to encourage the lawyers, who do practice in this area, to continue to do so, if courts routinely slash fee awards without analysis or explanation. Counsel practicing in this area have found this to occur all too often.

I. ARGUMENT

A. Vindication of Illinois' Consumers Rights Hinges on Trial Courts Awarding Attorney's Fees Under the Illinois Consumer Fraud Act's Fee-Shifting Provision

The Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ICLS 505/1 *et seq.* (the "Consumer Fraud Act"), is a "regulatory and remedial statute intended to protect consumers against fraud, unfair methods of competition, and other unfair and deceptive business practices." *Cripe v. Leiter*, 184 Ill.2d 185, 190-91 (1998). The Consumer Fraud Act should be "liberally construed to effectuate its purpose". *Id.* at 191 (citing *Connick v. Suzuki Motor Co., Ltd.*, 174 Ill.2d 482, 503

(1996)). Section 10a(c) of the Consumer Fraud Act authorizes a private right of action for "[a]ny person who suffers actual damages as a result of a violation of [the] Act." 815 ILCS 505/10a(a) (West 2018); *Krautsack v. Anderson*, 223 Ill.2d 541, 553 (2006). Accordingly, one of the express purposes of the Consumer Fraud Act's fee-shifting provision is to provide consumers with access to legal assistance in the pursuit of their legal remedies under the statute. *Id.* at 557. The fee-shifting provision in the Consumer Fraud Act is particularly important because it "allows defrauded consumers, whose claims are frequently small, to obtain counsel and seek redress under the Act." *Allen v. Woodfield Chevrolet, Inc.*, 208 Ill.2d 12, 30–31 (2003). "Compromising a consumer's ability to recover legal fees renders the protections of the Act illusory." *Id.*

Automobiles represent "one of the most important and expensive items purchased by consumers." *Totz v. Cont'l Du Page Acura*, 236 Ill.App.3d 891, 911 (2d Dist. 1992). However, even in Consumer Fraud Act cases involving the purchase of an automobile, a consumer's actual damages will often pale in comparison to the cost of litigation required to litigate a successful claim under the Act. *See e.g. Id.* at 910-11 ($19,674.60 in costs and fees vs. $407.50 in compensatory damages and $5,000 in punitive damages); *Majcher v. Laurel Motors, Inc.*, 287 Ill.App.3d 719, 723 (2d Dist. 1997) ($77,683.82 in costs and fees vs. approximately $20,000.00 in actual damages).

If Illinois courts are arbitrary in their attorney's fee awards under the Consumer Fraud Act and cut fees without analysis, consumer plaintiffs will be unable to obtain competent counsel to litigate claims that are often "complex with respect to the factual and legal issues presented." *Totz*, 236 Ill.App.3d at 910; see also *Keefe v.*

Allied Home Mortg., 393 Ill.App.3d 226, 235 (5th Dist. 2009) (under the Consumer Fraud Act, "the average consumer will not be able to successfully arbitrate or litigate a claim without the assistance of an attorney.").

B. Unreasoned or Arbitrary Reductions in Attorney's Fees Awarded Under the Consumer Fraud Act Threaten Consumers' Access to Justice

In order to promote uniformity and fairness across the State and to increase access to justice for Illinois' consumers, the Third District should join its four sister Districts and formally adopt the statutory fee-shifting framework arising out of the United States Supreme Court's decision in *Hensley v. Eckerhart*, 461 U.S. 424 (1983). Under this approach, a court "begin[s] by calculating the lodestar by multiplying the attorney's reasonable hourly rate by the number of hours reasonably expended." *Schlacher v. Law Offices of Phillip J. Rotche & Associates, P.C.,* 574 F.3d 852, 856 (7th Cir. 2009). There is a strong presumption that the lodestar represents a reasonable fee. *Id.* If a party seeks an adjustment to the lodestar, that party bears the burden of demonstrating that the "adjustment is *necessary* to the determination of a reasonable fee." *City of Burlington v. Dague,* 505 U.S. 557, 562 (1992) (quoting *Blum v. Stenson*, 465 U.S. 886, 898 (1984)).

The court can then consider the following factors in determining whether an enhanced fee is appropriate: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the

undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Hensley, 461 U.S. at 430 n.3*.

By adopting an objective and normative framework for calculating fee awards under the Consumer Fraud Act (and other similar fee-shifting statutory schemes), the Court would eliminate the common issues of circuit courts applying an unreasoned "proportionality" test, or worse, simply "eyeballing" a fee request and arbitrarily determining it is excessive. See e.g. *Millea v. Metro-North R. Co.*, 658 F.3d 154, 169 (2d Cir. 2011) ("The whole purpose of fee-shifting statutes is to generate attorneys' fees that are *disproportionate* to the plaintiff's recovery.") (emphasis added); *People Who Care v. Rockford Bd. of Educ.*, 90 F.3d 1307, 1314 (7th Cir. 1996) ("The court will not, however, 'eyeball' the fee request and cut it down by an arbitrary percentage, even if the request seems excessive, in the absence of objections stated with particularity and clarity."). By formally adopting *Helmsley*, the Third District would ensure that fee awards under the Consumer Fraud Act are rendered in a fair, objective, and standardized manner, and thereby promote access to justice for Illinois consumers by ensuring they can obtain competent counsel to aid in their pursuit of claims under the Consumer Fraud Act.

C. Conclusion

The *amici* have a keen interest in expanding access to justice by providing injured consumers with the ability to retain competent lawyers who will be fairly compensated for their efforts in the successful prosecution of their clients' claims under the Consumer Fraud Act. The statute gives a remedy for lawyers' fees and

costs because it is obvious that many "small" meritorious claims would otherwise not see the inside of a courtroom.

Many consumer fraud cases involve used car fraud. These cases are very complicated as they require expert testimony as to the diminished value of the vehicles and as to a used car dealer's knowledge regarding the poor and dangerous condition of the vehicle when sold. *Kim v. Mercedes-Benz, U.S.A., Inc.*, 353 Ill.App.3d 444, 457 (1st Dist. 2004), opinion modified on reh'g (Oct. 21, 2004).

Lawyers will not take on these risky and complex cases involving technical issues regarding complex products if courts routinely slash lawyers' fees without analysis or justification. Protecting consumers means ensuring that lawyers are willing to take on consumer fraud matters that can set precedent that protect consumers from widespread and unfortunately all too common fraudulent practices such as: (a) major car makers falsely certifying rebuilt wrecks as like new and then refusing to take responsibility (see *Twilight Transport, Inc. v. General Motors LLC*, 19-cv-1253 (N.D. Ill. June 26, 2019), attached hereto as Exhibit A); (b) used car dealers putting dangerous rebuilt wrecks into commerce that impair the safety of drivers, passengers and bystanders. *Twyman v. S&M Auto Brokers*, 16 C 4182, 2016 WL 6082357, at *4 (N.D. Ill. Oct. 18, 2016) ("Significantly, in a recently released opinion, a Cook County Circuit Court found that S&M Auto Brokers, one of the defendants here, violated the Illinois Consumer Fraud Act by failing to disclose that a vehicle it sold had been in a prior accident and had frame damage, noting that the vehicle's bent frame imperiled the plaintiff's safety and finding that punitive damages were appropriate.")

Effective access to justice in Illinois for consumers with meritorious Consumer Fraud Act claims hinges on the ability of consumers to reliably recover appropriate attorney's fees under Section 10(c) of the Consumer Fraud Act. If Illinois courts are permitted to reduce the award of attorney's fees to a successful consumer plaintiff—whether through an opaque or unreasoned methodology, or by improperly applying an *ad hoc* test of "proportionality"—access to justice for Illinois consumers will be substantially reduced, and the purpose of the Illinois Consumer Fraud Act will be thwarted.

The undersigned *amici* respectfully request that the Court amend (or reverse and remand) the Circuit Court's fee award, and issue an opinion which recognizes the importance of fee-shifting in individual consumer claims, and which thereby promotes access to justice by allowing individual consumers to attract qualified counsel to aid in the prosecution of their claims under the Consumer Fraud Act.

Respectfully Submitted,

NATIONAL ASSOCIATION OF CONSUMER ADVOCATES AND ILLINOIS TRIAL LAWYERS' ASSOCIATION

/s/ Patrick D. Austermuehle

Patrick D. Austermuehle (patrick@l-a.law)
Peter S. Lubin (peter@l-a.law)
LUBIN AUSTERMUEHLE, P.C. (#63335)
17W220 22nd Street, Suite 410
Oakbrook Terrace, Illinois 60181
630-333-0333

Counsel for Amici Curaie

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 7 pages.

/s/ Patrick D. Austermuehle

Counsel for Amici Curaie

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

TWILIGHT TRANSPORT, INC.,	
Plaintiff,	Case No. 19-cv-1253
v.	
GENERAL MOTORS, LLC,	Judge John Robert Blakey
Defendant.	

ORDER

Plaintiff Twilight Transport, Inc. sues Defendant General Motors, LLC under the Illinois Consumer Fraud and Deceptive Practices Act relating to Defendant's Certified Pre-Owned Vehicle program. Defendant moves to dismiss pursuant to Rule 12(b)(7) for failure to join a necessary party, and in the alternative, to transfer this action to the Southern District of Texas. [21]. For the reasons stated below, this Court denies Defendant's motion.

STATEMENT

Defendant maintains the "GMC Certified Pre-Owned" (CPO) program, through which it, and authorized dealers, sell used cars. [17] ¶ 9.[1] Defendant represents that CPO vehicles must meet certain criteria, including passing a 172-point vehicle inspection and reconditioning process. *Id.* ¶ 10. Although Defendant delegates pre-sale vehicle inspection and reconditioning to authorized dealers, it represents that the vehicle and the CPO benefits come from Defendant. *Id.* ¶ 11.

In September 2018, Plaintiff's president, David Wilkozek, used Defendant's CPO website to purchase a truck. *Id.* ¶ 22. Defendant's website advertised the truck on its CPO website as meeting the strict criteria for CPO vehicles. *Id.* ¶ 14. Non-party West Point GMC Buick of Houston, Texas (West Point) offered for sale the truck that Wilkozek wanted to buy. *Id.* ¶ 22. Plaintiff ultimately purchased the truck from West Point; soon after the truck was shipped to Illinois, however, Plaintiff discovered multiple problems with the truck, including unrepaired accident damages, paint flaws, and broken glass under the seats. *Id.* ¶¶ 27, 31. Plaintiff claims that the truck should have failed 21 out of 172 items on Defendant's 172-point inspection checklist. *Id.* ¶ 38. Plaintiff sues Defendant under the Illinois Consumer Fraud and Deceptive

[1] This Court takes these facts from Plaintiff's amended complaint [17].

EXHIBIT
A

Business Practices Act (Consumer Act) to redress its alleged injuries. *See generally id.*

Courts may dismiss a complaint where a plaintiff fails to join a necessary party under Rule 19. Fed. R. Civ. P. 12(b)(7). Dismissal under Rule 19 involves a two-step inquiry. *Davis Cos. v. Emerald Casino, Inc.*, 268 F.3d 477, 481 (7th Cir. 2001). First, this Court must decide if a party is necessary to the case. *Id.*; Fed. R. Civ. P. 19(a). Second, if a party is necessary but cannot be joined, this Court must determine under Rule 19(b) "whether, in equity and good conscience, the action should proceed among the existing parties" without the necessary person "or should be dismissed." *Davis*, 268 F.3d at 481; Fed. R. Civ. P. 19(b). In considering a Rule 12(b)(7) motion, this Court must accept the complaint's allegations as true. *Davis*, 268 F.3d at 479 n.2.

Defendant's motion fails at the first step of the Rule 19 inquiry, because West Point is not a necessary party. When determining whether a party is necessary, this Court considers whether: (1) it can accord complete relief to the existing parties; (2) the absent party's ability to protect its interest will be impaired if not joined; and (3) the existing parties may be subject to a risk of multiple or inconsistent obligations without joinder. Fed. R. Civ. P. 19(a); *Askew v. Sheriff of Cook Cty., Ill.*, 568 F.3d 632, 635 (7th Cir. 2009).

First, complete relief can be granted to the existing parties in West Point's absence. Although Defendant argues that it "cannot refund purchase money" because West Point sold the truck, *see* [22] at 6, Plaintiff does not sue for that purchase money. Rather, Plaintiff sues Defendant for alleged misrepresentations Defendant made on its CPO websites, and for allegedly refusing to stand behind its CPO certifications. *See* [17] ¶¶ 45, 53–54, 56, 63–65. The conduct for which Plaintiff seeks to hold Defendant liable thus concerns how Defendant held itself out to Plaintiff; West Point's presence as a party remains unnecessary to this Court's analysis on that issue.

Second, Defendant fails to demonstrate that West Point's ability to protect its interest will be impaired if not joined in this action. On this point, Defendant contends that West Point will be unable to defend itself against allegations that "it committed an error or fraud thousands of miles from the Court presiding over the case." [22] at 6. But again, the amended complaint seeks to hold Defendant liable for its own conduct, not for West Point's actions or inactions. *See* [17]. Thus, West Point's interest (to the extent it has any at all) will not be impaired if not joined here.

Third, nothing in the current record suggests that adjudicating this case in West Point's absence would subject Plaintiff or Defendant to a substantial risk of double, multiple, or otherwise inconsistent obligations. Defendant argues that omitting West Point exposes Defendant to refunding or returning money that Plaintiff paid for the truck, even though Defendant did not sell the truck. [22] at 6–7. But, as discussed above, Defendant's liability to Plaintiff, if any, does not flow from

the purchase contract for the truck. Rather, Plaintiff sues for statutory damages under the ICFA, which stem from Defendant's alleged representations and business practices. This factor thus also disfavors Defendant.

In sum, the factors under Rule 19(a)(1) demonstrate that West Point is not a necessary party to this action. Accordingly, this Court denies Defendant's motion to the extent it seeks dismissal pursuant to Rule 12(b)(7).

Defendant argues in the alternative that this Court should transfer this case to the Southern District of Texas under 28 U.S.C. § 1404(a). [22] at 12–13. This Court considers the following factors on a motion to transfer: (1) whether venue is proper in both districts; (2) whether a transfer will better serve the convenience of the parties and witnesses; and (3) whether a transfer will better serve the interest of justice. *See Craik v. Boeing Co.*, 37 F. Supp. 3d 954, 959 (N.D. Ill. 2013) (citing *Coffey v. Van Dorn Iron Works*, 796 F.2d 217, 219 (7th Cir. 1986)). The moving party has the burden of establishing that "the transferee forum is clearly more convenient." *Coffey*, 796 F.2d at 219–20. The plaintiff's choice will otherwise receive deference: "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." *In re Nat'l Presto Indus., Inc.*, 347 F.3d 662, 664 (7th Cir. 2003) (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947)). The task of weighing these factors "is committed to the sound discretion of the trial judge." *Coffey*, 796 F.2d at 219.

Here, neither party disputes that venue is proper in this district and would also be proper in the Southern District of Texas. *See* [22] at 13; [26] at 10. Defendant, however, fails to establish that the Southern District of Texas constitutes a more convenient forum for the parties and their witnesses. In briefing and at oral argument, defense counsel represented that he anticipates that all but two witnesses will be located in Houston. *See, e.g.*, [29] at 6. Defense counsel, however, offers no actual evidence to substantiate that representation; thus, this Court does not place weight upon the relative convenience to these purported witnesses in its analysis. *See, e.g.*, *Moore v. Motor Coach Indus., Inc.*, 487 F. Supp. 2d 1003, 1008 (N.D. Ill. 2007) (refusing to consider convenience to certain witnesses in conducting transfer analysis where party failed to provide "any affidavits or other actual evidence specifying" those witnesses and their purported testimony); *cf. Simonian v. Monster Cable Prod., Inc.*, 821 F. Supp. 2d 996, 999 (N.D. Ill. 2010) (granting venue transfer motion where the defendant "provided evidence via affidavit" showing that its witnesses were all located in California). Moreover, even if this Court accepted Defendant's representation that many of its witnesses are located in Houston, according to the Amended Complaint, Plaintiff and a number of its anticipated non-party witnesses reside in Illinois. *See* [26] at 11; [17] ¶¶ 4, 30–31. In this Court's analysis, the convenience to the parties and witnesses thus does not favor transfer.

Finally, Defendant has not addressed, either in its briefs or at oral argument, the third factor of a venue transfer analysis: whether a transfer will better serve the interest of justice. *See, e.g.*, [22] [29]. Thus, based upon the entire record before it, this Court finds that Defendant has failed to meet its burden to demonstrate that this Court should disturb Plaintiff's choice of forum.

For the above reasons, Defendant's motion [21] is denied. All dates and deadlines stand.

Dated: June 26, 2019

Entered:

John Robert Blakey
United States District Judge