

# Commercial Banking, Collections and Bankruptcy

The newsletter of the Illinois State Bar Association's Section on Commercial Banking, Collections and Bankruptcy

## Law Day and the Rule of Law

BY JUDGE MICHAEL CHMIEL

It is May, which means we once again celebrate Law Day and the rule of law. If you have not already done so in the past year, reach out to a school or community group and offer to make a presentation. It can be as simple as explaining what

you, as an attorney, do in your day job. PowerPoint slides and/or written materials are nice—and actually help the audience remember you and how to contact you when needed—but are not essential.

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## Consumer Fraud in a Dispute Between Two Businesses: Is It a Thing?

BY ADAM B. WHITEMAN

Can one business sue another for consumer fraud? As is the case with most legal questions, the answer is: It depends. In Illinois, when there are allegations of consumer fraud, and “where the dispute involves two businesses who are not consumers, the proper test is . . . whether the alleged conduct involves trade practices addressed to the market generally or otherwise implicates consumer protection concerns.” *Downers Grove Volkswagen, Inc.*

*v. Wigglesworth Imports, Inc.*, 546 N.E.2d 33, 41 (2<sup>nd</sup> Dist. 1989)

An area that one might think implicates consumer protection concerns is in construction disputes. After all, if a building is constructed in a defective manner, it might fall down and injure a consumer. However, such is not the kind of concern that is referenced in *Downers Grove Volkswagen*. It has been determined

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(Presentation pointer: Visit ILCivics.org, which will route you to ISBA Lawyers in Classrooms and the ISBA Speakers Bureau pages. These pages invite volunteerism, but regardless of volunteerism, offer various materials for use in presentations.) What is essential is talking law—setting an example of how the law and the legal system that facilitates it work. Try it—you will like it—and the community and the rule of law will benefit from your efforts!

In this edition of the newsletter of the Commercial Banking, Collections, and Bankruptcy Section of the Illinois State Bar Association, we have three articles to

offer. First, we have an interesting article on the blend on consumer protectionism into commercial settings by our own, Adam Whiteman. Next, we have an article on new residential protectionism by a first-time contributor, Taylor Wacha, who practices with our chair. Last but not least, we have another case review from the appellate court by Andrew Mertzenich.

Questions or comments on any of this are welcome, along with other relevant items for publication, through [mjchmiel@22ndcircuit.illinoiscourts.gov](mailto:mjchmiel@22ndcircuit.illinoiscourts.gov). Happy May. ■

## Consumer Fraud in a Dispute Between Two Businesses: Is It a Thing?

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that under Illinois law, “[t]here is no inherent consumer interest implicated in a construction contract between a general contractor and a subcontractor.” *Lake County Grading Co. of Libertyville, Inc.*, 654 N.E.2d 1109, 1116 (2nd Dist. 1995)

The *Lake County Grading Co.* court noted: “[I]f litigants could invoke the Act merely by alleging an intentional or fraudulent breach of a contract, common-law breach of contract actions would be supplemented in every case with an additional and redundant remedy under the Act.” *Lake County Grading Co. of Libertyville, Inc.*, 654 N.E.2d 1109, 1116 (2nd Dist. 1995).

Virtually all construction defects have the potential to endanger consumers. Defective sidewalks can trip people, defective foundations can cause buildings to fall, etc. That is why the *Lake County Grading Co.* case precludes application of the Consumer Fraud Act between contractors in a case involving allegations of construction defects.

A “consumer protection concern” is not created simply because a product is ultimately sold to a consumer. In *Stepan Co. v. Winter Panel Corp.*, 948 F. Supp. 802 (N.D. Ill. 1996), a manufacturer of insulating panels (Winter Panel Corp) asserted a

consumer fraud counterclaim against its supplier of foam products (Stepan Co.) who allegedly delivered defective chemicals that were subsequently incorporated in insulating panels, which were then sold to customers for use in residential and commercial construction. *First*, the court noted that since the materials were purchased for resale, the transaction did not involve a consumer under the definitions of 815 ILCS 515/1(e). *Next*, the court noted that the argument that the ultimate products eventually find their way to a consumer, does not *per se* qualify the matter as a Consumer Fraud Act claim. Specifically, the court explained as follows:

Almost every product sold by one commercial party to another will ultimately be sold to or otherwise effect a consumer. Consequently, if allegations such as Winter Panel’s are sufficient to bring the claim within the ambit of the Act, the Act would apply to nearly all commercial transactions, a result contrary to the intent of the legislature as presently interpreted.” *Stepan Co. v. Winter Panel Corp.*, 948 F. Supp. 802, 807 (N.D. Ill. 1996). A consumer protection concern can be

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raised in a dispute between two businesses when the defendant has actual direct contact with consumers. For example:

[W]here plaintiff has alleged defendant published false information about its prices for services, plaintiff has alleged conduct which implicates consumer-protections concerns. Thus, plaintiff has standing to sue under the Act.

*Downers Grove Volkswagen, Inc. v.*

*Wigglesworth Imports, Inc.*, 546 N.E.2d at 41 (2nd Cir. 1989).

Since the *Downers Grove Volkswagen* case:

[C]ourts have consistently resisted attempts by litigants to portray otherwise ordinary breach

of contract claims as causes of action under the Act. . . . Accordingly, the following language of the rule stated in *Downers Grove* remains viable: where a plaintiff attempts to allege a violation of the Act in a case which appears on its face to involve only a breach of contract, the relevant inquiry is “whether the alleged conduct . . . implicates consumer protection concerns.

*Lake County Grading Co. of Libertyville, Inc. v. Advance Mechanical Contractors, Inc.*, 654 N.E.2d 1109, 1116 (2nd Dist. 1995)

In sum, it would appear that one business can sue another for consumer fraud if the allegation involves conduct where one

business publishes false statements about another business, to consumers. The lesson is you might want to be careful when making statements to consumers about your competition. Sticks and stones may break bones, but words can also hurt if they result in the filing of a consumer fraud complaint. ■

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# Cook County Enacts New Residential Landlord-Tenant Ordinance

BY TAYLOR H. WACHAL

On January 28, 2021, the Cook County Board commissioners approved a suburban residential landlord-tenant ordinance (the “Cook County Ordinance”). It will create regulations throughout the entire county, except for municipalities of Chicago, Mount Prospect, and Evanston, which already have their own regulations in place. In many ways, the Cook County Ordinance mirror’s Chicago’s ordinance. Suburban landlords will now have another level of due diligence to consider, prior to renting out their properties. However, the following types of properties are exempt from the Cook County Ordinance:

1. Owner-occupied buildings with six units or less; and
2. Single-family homes, or single condominium units, that are not owned or managed by a company, where the owner or owner’s family member has resided in the property within the last twelve months.

The Cook County Ordinance takes effect June 1, 2021. Below are some of the key points of the new ordinance.

## Prohibited Lockouts

The provision of the Cook County Ordinance that prohibits landlords from locking out tenants without the proper eviction process (illegal eviction) went into effect immediately. This is the only immediately applicable regulation. If the landlord illegally locks out the tenant, the tenant may file suit to get back into the unit plus for his or her attorneys’ fees and damages (two months’ rent or twice the actual damages, whichever is greater).

## Late Fees

Landlords are prevented from charging late fees greater than \$10 per month for the first \$1,000 in rent, plus 5 percent per month for any amount of rent over \$1,000. For example, if a monthly rental amount of \$1,500 is late, the highest fee a landlord may charge is \$35.

## Security Deposits

Security deposits may be no more than 1.5 times the monthly rent. Any amount in excess of the value of one month’s rent,

at the election of the tenant, shall be paid either simultaneously with the initial security deposit, *or* in no more than six installments within six months after the effective date of the applicable lease. Security deposit payments cannot be disguised or utilized as anything other than a security deposit (i.e., move-in fee, pet fee, etc.).

Also, security deposits shall be held in an account of a financial institution located in the State of Illinois. Those funds remain an asset of the tenant and may not be commingled with assets of the landlord. The funds must be deposited into a separate account that complies with the Cook County Ordinance. The deposit must be returned to the tenant within thirty days of moving out. If the landlord retains any portion of the deposit, a detailed explanation of the costs to support that retention must be provided to the tenant within thirty days.

## Move-In Fees

Move-in fees *are* permitted, but an itemization including a reasonable estimate of the landlord’s cost for moving the tenant

into the unit, must be provided as support for the fee.

### Lease Renewal/Non-Renewal

The landlord must notify the tenant in writing of his or her intent to not renew the existing rental agreement at least sixty days prior to the termination date of the applicable lease. If the landlord fails to give required written notice, the tenant may remain living in the property for up to 120 days after the date on which the notice *should* have been given. During that time, the terms and conditions of the lease stay the same.

Further, no tenant may be required to renew a lease more than 60 days prior to the termination date of the applicable lease. If the landlord violates this regulation and requires further notice, the tenant may recover one month's rent or actual damages, whichever is greater.

### Landlord's Access to Property

A landlord must give two days' notice to the tenant if the landlord intends to access the property. The landlord may only enter

the property between 8:00 a.m. and 8:00 p.m., unless emergency access was necessary. If the landlord unlawfully enters the property, the tenant may file suit and recover one month's rent or twice the actual damages, whichever is greater, plus attorneys' fees.

### Attorneys' Fees

There are various provisions of the Cook County Ordinance that provide for the recovery of attorneys' fees by both the tenant and landlord. However, the Cook County Ordinance prohibits leases from including a provision that generally states that the tenant will pay for the landlord's attorneys' fees in an eviction lawsuit. Attorneys' fees are only recoverable if provided by court rules or statute. Further, the Cook County Ordinance provides for statutory damages of two months' rent or recovery of actual damages, if a lease contains a provision of this nature.

### Landlord Repairs

Landlords will be given timelines to address defects of their properties and will be subject to lease terminations or loss in, should they miss the deadlines. For example,

minor problems (i.e., repairs that don't cost more than \$500 or half a month's rent, whichever is greater) must be fixed within fourteen days upon written notification from the tenant, or the renter can fix it themselves and deduct the cost from their rent. If the landlord fails to repair the defect within 14 days after notice, the tenant may deduct rent in an amount that reasonably reflects the reduction in rental value caused by said defect. The tenant may also file a lawsuit for an injunction plus any damages the defect has caused them.

The above points are what we deem to be the most pertinent changes to for Cook County landlords. For further guidance on all of the new regulations under the Cook County Ordinance, it is best to review the full text. ■

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# The Second District Civil Decision Digest for the Commercial Banking, Collections & Bankruptcy Section

BY ANDREW J. MERTZENICH

This digest provides a survey of cases which may be of interest to the Commercial Banking, Collections, and Bankruptcy Section of the Illinois State Bar Association. This digest focuses on a decision published in March of 2021 by the Appellate Court of Illinois for the Second District.

### Process

**Lisle Savings Bank v. Tripp, 2021 IL App (2d) 200019**

County: DuPage

Date Filed: 3/30/2021

**Facts:** On August 10, 2015, Lisle Savings Bank (Bank) filed a mortgage foreclosure complaint against defendant Deanna Tripp, her husband, Ronald, and others. The summons served on defendant was captioned *Lisle Savings Bank v. Ronald D. Tripp, et al.* and defendant was listed individually in the service list. None of the defendants appeared as summoned and the trial court entered a default judgment in favor of the bank on December 21, 2015. A foreclosure sale was conducted on May 10, 2018 following the resolution of a bankruptcy proceeding in which defendant

was a debtor. On June 26, 2018, the trial court entered an order approving the sale. On July 23, 2018, defendant entered an appearance and moved to quash service on the ground that the summons was ineffective because her name did not appear on its fact. The trial court denied the motion and this appeal ensued.

**Issues on Appeal:** Whether the service of summons conferred to the trial court personal jurisdiction over defendant where her name—without her defendant status—appeared only on the service list accompanying the summons.

**Holding:** Affirmed.

**Analysis:** Pursuant to 735 ILCS 5/2-201(c), “[a] court’s jurisdiction is not affected by a technical error in format of a summons if the summons has been issued by a clerk of the court, the person or entity to be served is identified as a defendant on the summons, and the summons is properly served.”

Here, the caption of the summons was a technical error at most and did not affect the trial court’s jurisdiction over defendant.

“We have recently noted that the purpose of a summons is to notify a party that an action has been commenced against him. The summons here served that purpose. Although [defendant] was not named in the caption, the words ‘To each Defendant: see attached service list’ appear directly underneath the caption. Those words were sufficient to notify those named on the service list that they were defendants, and

even a cursory inspection of the complaint served with the summons would confirm that that was the case.” (¶ 25; citation omitted)

**Cross Reference:** N/A

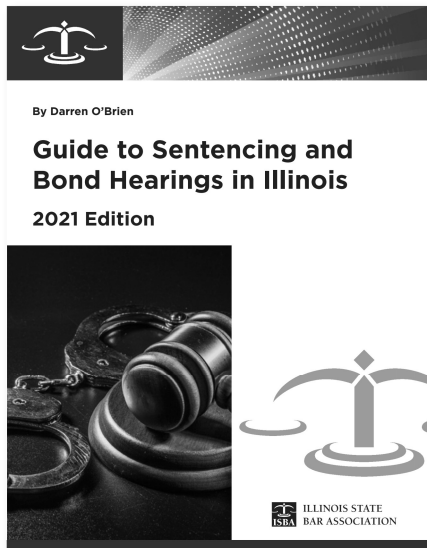
**Editor’s Notes:** N/A ■

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