

SURVEY OF ILLINOIS LAW: CONTRACT LAW

Honorable Daniel T. Gillespie*

I. INTRODUCTION

This article will examine eleven recent cases decided by the Illinois Supreme Court from November 2004 to December 2006 that apply and interpret contract law. The court has addressed several important concepts in contract law, including restrictive covenants in employment contracts, arbitration clauses and attorney-client contracts. In two cases the court explored the impact of contract law on class action suits, and in two other cases, the court applied the doctrine of unconscionability. Contracts have been defined as agreements between two or more parties which contain three essential elements of a contract: offer, acceptance and consideration. That definition has been evolving, with advances in communication and technology. For example, the process of forming a particular contract today might well not involve a formal negotiation between two or more people resulting in a document co-signed by the parties. The agreement may be created by words exchanged in a telephone conversation, an exchange of faxes or a click of a mouse on a computer. Some of the cases discussed in this article involve contracts alleged to have been created by inserting a statement in an owner's manual of a new car or in an employee handbook.

II. UNLICENSED FIRM SUING FOR PROFESSIONAL SERVICES

One tenet of contract law is that if a contracting party is not properly licensed, he or she may not be able to recover in a contract action for nonpayment of fees. The threshold question is whether the statute is a revenue or a licensing statute. For example, as explained by the cases discussed in this section, if legal, medical or architectural services are provided by someone not properly licensed as an attorney, doctor or architect, an action to recover

* Daniel T. Gillespie is an associate judge of the Circuit Court of Cook County. He presides over a civil call consisting primarily of contract cases and is the supervisor of the First Municipal District Contract and Tort Non-Jury Section. He was awarded a B.S. degree in Business Administration from John Carroll University in 1970 and is a 1978 graduate of The John Marshall Law School. Judge Gillespie is an adjunct professor of business law at the DePaul University College of Commerce and an adjunct instructor of trial practice at the Loyola University Law School. He serves on the Municipal Law Committee of the Chicago Bar Association, as well as on the Civil Practice and Procedure Section of the Illinois State Bar Association.

unpaid fees will fail. In *Lozoff v. Shore Heights, Ltd.*,¹ the Illinois Supreme Court voided the contract for attorney fees because the attorney was not properly licensed in Illinois, based on the public policy that public safety and welfare are protected when such persons take the appropriate education and pass the appropriate tests for licensing. If an unlicensed attorney may not recover in a contract action for legal fees earned, does it follow that an unlicensed firm cannot recover for attorney fees? If a group of licensed podiatrists is organized into a professional corporation that is not properly registered with the Illinois Department of Professional Regulation, can that corporation recover in a contract action for services? Those are issues the Illinois Supreme Court addressed in *Ford Motor Credit v. Sperry* and *Chatham Foot Specialists, P.C., v. Health Care Service Corporation*.

Ford Motor Credit v. Sperry

In *Ford Motor Credit v. Sperry*,² the court addressed the question of whether a judgment obtained by a licensed attorney who worked for a law firm that was not properly licensed under Supreme Court Rule 721(c) was void *ab initio*, as the trial judge and the appellate court had ruled. The supreme court held that duly licensed attorneys who practice law with a firm that lacks Rule 721(c) registration do not, by virtue of the unregistered nature of the law firm, engage in the unauthorized practice of law.³ In *Ford Motor*, Thomas Sperry had leased a car from Sycamore Auto Center, Inc., who assigned the lease to Ford Credit. When Sperry fell behind in his payments, he was sued by Ford for breach of contract.⁴ Sperry counter-sued, alleging violation of the Consumer Fraud and Deceptive Business Practices Act.⁵ Ford prevailed on the counter-claim and was awarded attorneys fees of \$31,717.25 under the Act, as the prevailing party on the consumer fraud count.⁶ A year later, Ford began collection proceedings against Sperry for the attorney fees.⁷

Twenty-one months after the original judgment and award of attorney fees, Sperry filed a petition under Section 2-1401(f) of the Code of Civil Procedure to vacate the attorney fees because Ford's law firm was not properly licensed during the proceedings, as required by Supreme Court Rule 721(c).⁸

-
1. *Lozoff v. Shore Heights, Ltd.* 66 Ill. 2d 398, 362 N.E.2d 1047 (1977).
 2. *Ford Motor Credit v. Sperry*, 214 Ill. 2d 371, 827 N.E.2d 422 (2005).
 3. *Id.* at 391, 827 N.E.2d at 434.
 4. *Id.* at 372, 827 N.E.2d at 424.
 5. *Id.*
 6. *Id.* at 373, 827 N.E.2d at 424.
 7. *Id.*
 8. *Id.* at 373-74, 827 N.E.2d at 424.

The attorney who argued the case for Ford, Mary K. Schulz, was properly licensed, but her firm, Virgil, Berkley, Schulz and Gordon, P.C., was not.⁹ The Kane County trial judge granted the Section 1401 petition and vacated the award of attorney fees, relying on *Kaplan v. Tabb Associates, Inc.*¹⁰ In *Kaplan* two Chicago attorneys, James Kaplan and Sheldon Sorosky, had entered into a contract with an architectural firm that was not properly licensed, as required by the Illinois Architectural Practice Act.¹¹ The two attorneys hired the architectural firm of Tabb, Inc., to renovate an old Chicago firehouse to function as their law office.¹² The sole owner of the corporation, Gregory Tabb, was a licensed architect and managed all the architectural work on the firehouse project.¹³ When a disagreement arose, the attorneys fired the architectural firm.¹⁴ The architectural firm sought to enforce the arbitration clause in the contract.¹⁵ The attorneys initiated an action in chancery to have the contract declared void because the architectural firm was not properly licensed.¹⁶ The chancellor was not persuaded and granted summary judgment for the defendant architectural firm.¹⁷ In reversing the ruling of the chancery judge, the First District Appellate Court ruling declared the contract for architectural services void because the architectural firm was not properly licensed under the Illinois Architectural Practice Act.¹⁸

In affirming the granting of the Section 1401 petition by the trial judge, the majority opinion of the Illinois Appellate Court for the Second District relied primarily on *Remole Soil Service, Inc. v. Benson*,¹⁹ which had held that legal proceedings prosecuted by those without authority are null and that judgments resulting from such proceedings are void.²⁰ Accordingly, the appellate court found that the order awarding Ford Motor Credit statutory attorney fees was void *ab initio*.²¹ In dissent, Justice Kapala suggested that the 1401 petition to vacate attorney fees constituted an improper collateral attack

9. *Id.* at 374, 827 N.E.2d at 424–25.

10. *Id.* at 376, 827 N.E.2d at 426 (citing *Kaplan v. Tabb Assoc. Inc.*, 276 Ill. App. 3d 320, 657 N.E.2d 1065 (1st Dist. 1995)).

11. *Kaplan*, 276 Ill. App. 3d at 322, 657 N.E.2d at 1066.

12. *Id.*

13. *Id.* at 322, 657 N.E.2d at 1066.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at 321, 657 N.E.2d at 1066.

18. *Id.* at 325, 657 N.E.2d at 1068.

19. *Remole Soil Serv. Inc. v. Benson*, 68 Ill. App. 2d 234, 215 N.E.2d 678 (4th Dist. 1966).

20. *Ford Motor Credit v. Sperry*, 344 Ill. App. 3d 1068, 1072, 801 N.E.2d 954, 957 (2d Dist. 2003).

21. *Id.*

on a final order.²² He asserted further that even if it could be considered a proper 1401 petition, the majority still should have reversed the granting of the 1401 petition because the case was controlled by that appellate court's prior ruling in *Joseph P. Storto v. Becker, P.C.*²³ In *Storto*, the appellate court had held that Rule 721(c) was not enacted for the protection of the public safety and, therefore, contractual obligations owed to a law firm not properly registered under Rule 721(c) could not be declared void absent a showing of prejudice resulting from a failure to register.²⁴

The Illinois Supreme Court agreed with Justice Kapala, noting initially, as to whether the petition constituted a collateral attack on a judgment, that "[b]ecause of the disastrous consequences which follow when orders and judgments are allowed to be collaterally attacked, orders should be characterized as void only when no other alternative is possible."²⁵ The supreme court agreed that the Second District Appellate Court should have followed its own *Storto* opinion.²⁶ The *Storto* court, the supreme court noted, had observed that although Rule 721(c) requires professional service corporations to register with the Supreme Court, that rule lacks civil or criminal penalties for noncompliance.²⁷ If there were such penalties, the court concluded, that would demonstrate that rule was promulgated for the protection of public safety.²⁸ In addition, as the *Storto* court noted, law firms incorporate to limit the personal liability of the attorneys and to limit their own tax liability.²⁹ Accordingly, as the appellate court concluded, that rule was not written to protect the public safety.³⁰ For those reasons the appellate court ruled in *Storto* that the client should not escape liability for legal fees owed to the firm where the attorneys were each properly licensed although the firm was not.³¹ Adopting the reasoning of *Storto*, the Illinois Supreme Court declared, "[w]e hold that a violation of the registration requirement contained in Rule 721(c) does not lead to the conclusion that the lawyers of the unregistered firm lacked either the authority or the competence to practice law."³² Accordingly,

22. *Id.* at 1072, 801 N.E.2d at 958.

23. *Joseph P. Storto v. Becker, P.C.*, 341 Ill. App. 3d 337, 792 N.E.2d 384 (2d Dist. 2003).

24. *Id.* at 345, 792 N.E.2d at 391.

25. *Ford Motor Credit*, 214 Ill. 2d at 380 (citing *Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 199 Ill. 2d 325, 341, 770 N.E.2d 177, 188 (2002); quoting *In re Marriage of Vernon*, 253 Ill. App. 3d 783, 788, 625 N.E.2d 823, 827 (4th Dist. 1993)).

26. *Ford Motor Credit*, 214 Ill. 2d at 386, 827 N.E.2d at 431.

27. *Id.* at 386, 827 N.E.2d at 431.

28. *Id.*

29. *Id.* at 387, 827 N.E.2d at 432.

30. *Id.*

31. *Id.*

32. *Id.* at 387, 827 N.E.2d at 432.

the supreme court held that duly licensed attorneys who practice law with a law firm that lacks Rule 721(c) registration do not, by virtue of the unregistered nature of the law firm, engage in the unauthorized practice of law.³³

Chatham Foot Specialists, P.C., v. Health Care Service Corporation

Chatham was an Illinois professional service corporation which delivered podiatric services.³⁴ All of its podiatrists were properly licensed.³⁵ Chatham contracted with Blue Cross to deliver podiatric services.³⁶ Although Chatham was properly organized under the Professional Service Corporation Act and was in good standing with the Secretary of State, it did not have a current certificate of registration issued by the Illinois Department of Professional Regulation (the Department).³⁷ In November 2001, Blue Cross cancelled the contract.³⁸ Chatham sued Blue Cross for breach of contract and other related claims.³⁹ The trial court granted Blue Cross' motion for summary judgment which was based on the argument that, since Chatham did not have a current certificate of registration from the Department, Chatham had not complied with the mandatory licensing provisions of the Illinois Medical Practice Act and Medical Corporation Act and therefore should be barred from maintaining an action to recover fees.⁴⁰ The appellate court affirmed, holding that the Podiatric Medical Act provides that a corporation organized to deliver podiatric services must have a certificate of registration under the Act to recover on a suit for fees for medical services provided.⁴¹ Like the trial judge in the *Ford Motor* case, the appellate court relied on *Kaplan*, which held that where the architect was properly licensed but his firm was not, the firm could not recover on a suit for architectural fees.⁴² The appellate court, here, also rejected the *Storto* ruling.⁴³

In reversing, the Illinois Supreme Court began its analysis by noting that, "courts will not enforce a contract involving a party who does not have a

33. *Id.* at 390, 827 N.E.2d at 434.

34. *Chatham Foot Specialists, P.C., v. Health Care Serv. Corp.*, 216 Ill. 2d 366, 368, 837 N.E.2d 48, 50 (2005).

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* at 370, 837 N.E.2d at 51.

39. *Id.*

40. *Id.*

41. *Id.* at 374, 837 N.E.2d at 53.

42. *Id.* at 375, 837 N.E.2d at 54.

43. *Id.*

license called for by legislation that expressly prohibits the carrying on of the particular activity without a license where the legislation was enacted for the protection of the public, not as a revenue measure.”⁴⁴ The supreme court also cited *Lozoff v. Shore Heights, Ltd.*, for the proposition that “where a licensing requirement has been enacted not to generate revenue, but rather to safeguard the public by assuring them of adequately trained practitioners, the unlicensed party may not recover fees for services or otherwise enforce a contract.”⁴⁵ In its analysis the court framed the issue before it as “whether the Act’s certificate of registration requirement is an administrative mechanism by which professionals may provide their services in the corporate form, or whether it is a regulatory provision.”⁴⁶ The court noted that podiatrists are required to meet certain education and testing requirements before being licensed as podiatrists.⁴⁷ Licensed podiatrists can, the court noted, incorporate under the Act and, upon payment of a \$50 initial registration fee and an annual renewal fee, receive a certificate of registration.⁴⁸ Upon reviewing the relevant provisions of the Podiatric Medical Practice Act and the Professional Service Corporation Act, the court concluded that the requirement imposed on the corporation to obtain a certificate of registration “was not enacted as a regulatory measure to protect the public health, safety and welfare.”⁴⁹ Accordingly, the supreme court held that the appellate court erred in concluding that the terms “license” and “certificate of registration” are synonymous, finding that nothing in the statutory provisions supports the interpretation that a license and a certificate of registration are functionally equivalent.⁵⁰

The supreme court adopted the appellate decision of *Riggs v. Woman to Woman, Obstetrics & Gynecology, P.C.*⁵¹ The *Riggs* court held that lack of a certificate of registration under the Act to practice as a professional service corporation does not equate with the lack of a license to practice medicine.⁵² The supreme court noted that the *Riggs* court emphasized that while statutes requiring licenses to practice a profession are necessary to protect the public

44. *Id.* at 381, 837 N.E.2d at 57 (citing *Ransburg v. Haase*, 224 Ill. App. 3d 681, 684–85, 586 N.E.2d 1295 (3d Dist. 1992)).

45. *Id.* (citing *Lozoff v. Shore Heights, Ltd.*, 66 Ill. 2d 398, 362 N.E.2d 1047 (1977)).

46. *Id.*

47. *Id.* at 383–84, 837 N.E.2d at 58–59.

48. *Id.* at 387, 837 N.E.2d at 61.

49. *Id.* at 389, 837 N.E.2d at 62.

50. *Id.*

51. *Riggs v. Woman to Woman, Obstetrics & Gynecology, P.C.*, 351 Ill. App. 3d 268, 275, 812 N.E.2d 1027, 1037 (2d Dist. 2004).

52. *Chatham*, 216 Ill. 2d at 319, 837 N.E.2d at 63.

safety by requiring professionals to be adequately trained, a violation of the Act by not paying the registration or renewal fee does not necessarily mean that those doctors lack the necessary skills to practice medicine.⁵³ They are licensed to practice medicine.⁵⁴ They simply have not paid the registration fee to practice as a corporation.⁵⁵ Therefore, the *Riggs* court concluded, and the supreme court agreed, since nothing in the Act's plain language states that it was enacted for public health, safety and welfare, a failure to comply with the Act's registration requirement does not render the contractual agreement in that case void *ab initio*.⁵⁶ The supreme court also relied on its reasoning in the *Ford Motor* case, where the court held that duly licensed attorneys who practice with a law firm that lacks Rule 721(c) registration do not engage in the unauthorized practice of law.⁵⁷ The same reasoning, the court held, applies to the doctors of Chatham Foot Specialists, P.C.⁵⁸

III. UNCONSCIONABILITY

When a court strikes a contract provision for unconscionability it is declaring that provision is so unfair or oppressive that the court will refuse to enforce it. That is a high threshold to meet, but the supreme court found that threshold was met and crossed in the two cases that follow. The first involved procedural unconscionability. The second involved substantive unconscionability.

Razor v. Hyundai Motor America

In *Razor v. Hyundai Motor America*,⁵⁹ the court addressed issues concerning procedural and substantive unconscionability. As the court described it, "Procedural unconscionability' refers to a situation where a term is so difficult to find, read, or understand that the plaintiff cannot fairly be said to have been aware he was agreeing to it."⁶⁰ Substantive unconscionability refers to terms that are "inordinately one-sided in one party's favor."⁶¹ This

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 399, 837 N.E.2d at 67.

58. *Id.*

59. *Razor v. Hyundai Motor America*, 222 Ill. 2d 75, 854 N.E.2d 607 (2006).

60. *Id.* at 100, 854 N.E.2d at 622 (citing with approval *Frank's Maint. & Eng'g v. C.A. Roberts Co.*, 86 Ill. App. 3d 980, 989, 408 N.E.2d 403, 410 (1st Dist. 1980)).

61. *Id.*

case also involved the intersection between the Magnuson-Moss Act and the UCC, and a shift in approach on the issue of whether a limited remedy failing of its essential purpose defeats a disclaimer of consequential damages, bringing it into line with a majority of jurisdictions that have considered this issue.

The main issue before the court was the enforceability of a clause in the warranty prohibiting the award of incidental and consequential damages.⁶² Hyundai argued that the disclaimer clause stands, independent of any limited remedy and only fails if it is unconscionable.⁶³ Plaintiff asserted the disclaimer should fall with the warranty, and, even if it is severable, that this disclaimer was unconscionable.⁶⁴ The jury found that the warranty failed of its essential purpose because the car regularly would not start.⁶⁵

Plaintiff Shante Razor bought a new Hyundai Sonata from Gartner Buick (Gartner) in August 2001.⁶⁶ She also bought a remote starter for the car from the dealer, the installation of which was subcontracted to Professional Sound Installers.⁶⁷ The car came with a five-year, 60,000 mile warranty, the provisions of which lie at the heart of this case.⁶⁸ The warranty was set forth in the owner's manual, which was in the glove compartment.⁶⁹ The warranty did not appear in the purchase contract.⁷⁰ Plaintiff did not see the warranty until after she drove it off the lot.⁷¹ The warranty covered repair and replacement of original Hyundai parts found to be defective.⁷² It did not cover damage from accessories not supplied by Hyundai.⁷³ The warranty also specifically excluded consequential damages.⁷⁴

In September 2001, Plaintiff Shante Razor began experiencing difficulties with the car.⁷⁵ On multiple occasions over the course of the next several months, service repairmen were called out to try to start the car and on one occasion, the day before Thanksgiving, when Shante Razor had taken the day off work to shop for Thanksgiving, it was towed in because even the

62. *Id.* at 84, 854 N.E.2d at 614.

63. *Id.*

64. *Id.* at 85, 854 N.E.2d at 614.

65. *Id.* at 87, 854 N.E.2d at 615.

66. *Id.* at 79, 854 N.E.2d at 610.

67. *Id.*

68. *Id.*

69. *Id.* at 81, 854 N.E.2d at 612.

70. *Id.*

71. *Id.*

72. *Id.* at 79, 854 N.E.2d at 611.

73. *Id.*

74. *Id.*

75. *Id.* at 80, 854 N.E.2d at 611.

technician making the service call could not start the car.⁷⁶ Eventually, the remote starter was replaced with an updated system, although starting problems continued.⁷⁷ The dealer replaced the “trans range switch” and the “starter relay.”⁷⁸ During the first four months plaintiff owned the car it was out of service approximately one-fourth of that time.⁷⁹ Plaintiff filed suit in December 2001 for breach of written warranty, breach of warranty of merchantability, and breach of the Illinois New Vehicle Protection Act.⁸⁰ The jury returned a verdict of \$5,000 for plaintiff on the warranty claim, \$3,500 in consequential damages and awarded plaintiff \$12,777 in attorney fees and costs, as the prevailing party.⁸¹ The jury found in favor of defendant under the New Vehicle Protection Act.⁸² The appellate court affirmed.⁸³ On appeal, plaintiff does not challenge the verdict for defendant on the New Vehicle Protection Act.⁸⁴

Hyundai did not challenge the finding that the warranty failed of its essential purpose.⁸⁵ Rather, on appeal, Hyundai argued that the mere fact that its warranty failed of its essential purpose does not invalidate the consequential damages disclaimer and contended that plaintiff’s testimony was insufficient to support her damage award.⁸⁶ Hyundai also contended that it should prevail on appeal and therefore not have to pay attorney fees and costs.⁸⁷ The supreme court agreed that plaintiff’s testimony was insufficient to support the verdict, reversing and remanding for more testimony on that count.⁸⁸ Having affirmed the verdict on Count I, the court allowed the attorney fees to stand.⁸⁹ The main thrust of the majority opinion focused on Hyundai’s disclaimer of consequential damages, which was contained in the warranty, described in the owner’s manual, which was placed in the glove compartment.

76. *Id.* at 80, 854 N.E.2d at 611–12.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 83, 854 N.E.2d at 613.

82. *Id.*

83. *Id.* at 84, 854 N.E.2d at 613 (citing *Razor v. Hundai Motor Am.*, 349 Ill. App. 3d 651, 813 N.E.2d 247 (1st Dist. 2004)).

84. *Id.* at 84, 854 N.E.2d at 614.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 110, 854 N.E.2d at 628.

89. *Id.* at 110–11, 854 N.E.2d at 628.

The court determined that a significant factor was that the customer never saw the warranty when she bought the car.⁹⁰ The warranty and its accompanying disclaimer of consequential damages were nowhere mentioned in the contract of sale.⁹¹ The warranty was located in the owner's manual, which the new car owner never saw or even had a chance to see until she took the owner's manual out of the glove compartment, after she had driven the car off the lot.⁹² Although, in its petition for a rehearing, Hyundai proclaimed how large the type was in its disclaimer,⁹³ the court held that fact to be singularly unpersuasive, since the customer was never shown the warranty when she signed the contract.⁹⁴

Hyundai argued that the disclaimer of consequential damages in the warranty should stand, even if the warranty failed of its essential purpose.⁹⁵ Plaintiff Shante Razor argued that even if the court finds the disclaimer to be severable from the warranty, the disclaimer was unconscionable under the facts of this case.⁹⁶ To determine the enforceability of a consequential damages disclaimer in a limited warranty, the supreme court looked to state law, or in this case, Article 2 of the UCC, which deals with the sale of goods.⁹⁷

The court addressed the issue of whether a limited remedy failing of its essential purpose defeats a disclaimer of consequential damages.⁹⁸ The two predominant schools of thought on this, the court pointed out, are the "dependent" and the "independent" approaches.⁹⁹ Plaintiff argues for the "dependent" approach, that a limited remedy failing of its essential purpose, defeats a disclaimer of consequential damages, asserting that the "dependent" approach is followed by a majority of jurisdictions that have considered the issue.¹⁰⁰ The court observed that while that may have been true 15 or 20 years ago, the majority of jurisdictions now follow the "independent" approach.¹⁰¹ The Illinois Supreme Court in this case adopted the "independent" approach.¹⁰²

90. *Id.* at 101, 854 N.E.2d at 623.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 85, 854 N.E.2d at 614.

96. *Id.*

97. *Id.* at 84, 854 N.E.2d at 614 (citing with favor *Lara v. Hyundai*, 331 Ill. App. 3d 53, 62, 770 N.E.2d 721 (2d Dist. 2002); *Sorce v. Naperville Jeep & Eagle, Inc.*, 309 Ill. App. 3d 313, 325 (2d Dist. 1999)).

98. *Id.*

99. *Id.* at 87, 854 N.E.2d at 615–16.

100. *Id.* at 89, 854 N.E.2d at 616.

101. *Id.* at 89, 854 N.E.2d at 616–17.

102. *Id.* at 92, 854 N.E.2d at 618.

The court declared that it was persuaded by the reasoning of *Chatlos Systems vs. National Cash Register Corp.*¹⁰³ quoting “the better reasoned approach is to treat the consequential damages disclaimer as an independent provision, valid unless unconscionable.”¹⁰⁴ Accordingly, the focus of the court’s inquiry became whether the disclaimer in this case was unconscionable.

As to unconscionability, the majority opinion noted that “[p]rocedural unconscionability refers to a situation where a term is so difficult to find, read or understand that the plaintiff cannot fairly be said to be aware she was agreeing to it.”¹⁰⁵ Hyundai argued that there was insufficient evidence presented at trial to support the trial court’s finding of unconscionability.¹⁰⁶ The supreme court disagreed and emphasized that the warranty was preprinted, the customer had no hand in its drafting and no bargaining power with respect to its terms.¹⁰⁷ The court found the deciding factor to be that the disclaimer was not made available to Shante Razor before or during the time she signed the contract.¹⁰⁸ The warranty and the disclaimer of damages were to be found in the owner’s manual, which was placed in the glove compartment and was unseen by and unavailable to her until she drove the car off the lot.¹⁰⁹ The court held that a finding of unconscionability may be based on either procedural or substantive unconscionability, or a combination of both.¹¹⁰

In her dissent to denial of a rehearing, Justice McMorrow agreed with the majority’s adoption of the “independent” approach but disagreed with the majority’s holding as to unconscionability and suggested that there should be a rehearing as to that issue.¹¹¹ Justice McMorrow disagreed with the holding that the manufacturer’s limited warranty is procedurally unconscionable.¹¹² McMorrow observed that federal regulations require the seller, in this case the dealer rather than the manufacturer, to make the warranty available at the time of the sale.¹¹³ The manufacturer, McMorrow observed, is required only to provide the seller with the necessary warranty materials.¹¹⁴ McMorrow argued that in addition to not being supported by federal law, the majority’s finding

103. *Chatlos Sys. v. Nat’l Cash Register Corp.*, 635 F.2d 1081 (3d Cir. 1980).

104. *Id.* at 90, 854 N.E.2d at 607.

105. *Razor* at 100, 854 N.E.2d at 622 (citing *Franks Maintenance & Engineering, Inc. v. C.A. Roberts Co.*, 86 Ill App. 3d 980, 989, 408 N.E.2d 403, 410 (1980)).

106. *Id.*

107. *Id.*

108. *Id.* at 100–01, 854 N.E.2d at 623.

109. *Id.* at 101, 854 N.E.2d at 623.

110. *Id.* at 99, 854 N.E.2d at 622.

111. *Id.* at 111, 854 N.E.2d at 629.

112. *Id.*

113. *Id.* at 113–14, 854 N.E.2d at 630 (citing 16 C.F.R. § 702.3 (2000)).

114. *Id.* (citing 16 C.F.R. §702.3(a), (b)(1)(i) (2000)).

of procedural unconscionability, where the manufacturer did not make the warranty available to the customer at the time of sale, was not supported by state contract law.¹¹⁵ If, as in this situation, the manufacturer cannot rely on the dealer to present the warranty to the customer at the time the contract is signed, must every auto manufacturer have a representative physically present at every dealer's store to make sure the warranty is properly conveyed to the customer at the time she signs the contract?¹¹⁶ That, McMorrow suggested, would be unreasonable.¹¹⁷

Kinkel v. Cingular Wireless, LLC

In *Kinkel v. Cingular Wireless, LLC*,¹¹⁸ the court examined the waiver of a class action claim in an arbitration clause. In July 2001, Donna Kinkel signed a two-year cell phone service contract with Cingular.¹¹⁹ The "TERMS AND CONDITIONS" appeared on the back of the contract in small type.¹²⁰ Donna Kinkel signed the contract on the front.¹²¹ Plaintiff cancelled her contract in April 2002, although it did not expire until July 2003.¹²² Kinkel filed a class action suit in August 2002 in Madison County, alleging that the \$250 early termination fee on her cell phone contract constitutes an illegal penalty and that the imposition of the \$250 fee constitutes a breach of the service agreement as well as a violation of the Illinois Fraud and Deceptive Business Practices Act.¹²³ The trial court denied Cingular's motion to compel arbitration, pursuant to the arbitration clause in the contract, finding that the arbitration clause was unenforceable on the basis of unconscionability.¹²⁴ The appellate court found the limitation on class arbitrations in the arbitration clause to be unconscionable, but severable from the remainder of the arbitration clause, which it felt should be enforced.¹²⁵ The effect of the appellate ruling was to stay plaintiff's lawsuit while her class action claim

115. *Id.* at 117, 854 N.E.2d at 632.

116. *Id.* at 117–18, 854 N.E.2d at 632.

117. *Id.* at 118, 854, N.E.2d at 632.

118. *Kinkel v. Cingular Wireless, LLC*, 223 Ill. 2d 1, 857 N.E.2d 250 (2006).

119. *Id.* at 5, 857 N.E.2d at 254.

120. *Id.*

121. *Id.*

122. *Id.*, 857 N.E.2d at 254–55.

123. *Id.* at 1, 857 N.E.2d at 254.

124. *Id.* at 6, 857 N.E.2d at 254.

125. *Id.*

proceeded to arbitration.¹²⁶ Whether that prohibition of class action arbitration is unconscionable was the issue before the Illinois Supreme Court.¹²⁷

Cingular argued that this class action was preempted by federal law, asserting that by enacting paragraph 2 of the Federal Arbitration Act, “Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.”¹²⁸ Essentially, Cingular was arguing that since the Federal Arbitration Act evidences a clear Congressional policy that arbitration clauses in cases involving interstate commerce, state statutes providing for class action and Consumer Fraud Act trials are preempted by the federal legislation.¹²⁹ The Illinois Supreme Court agreed that “a class action waiver cannot be found unconscionable on grounds that apply only to arbitration clauses” because “such a finding is expressly preempted by the FAA.”¹³⁰ However, as the court points out, plaintiff did not argue that the class action waiver was unconscionable solely because it is contained in an arbitration clause. Accordingly, the court found that since it was analyzing the disputed provisions of the arbitration clause in the same manner it would examine any contract, the supreme court’s review of this clause was not preempted by federal law.¹³¹

In its ruling, the appellate court relied on an earlier appellate court decision holding that a contract term cannot be deemed unconscionable unless it is both procedurally and substantively unconscionable.¹³² The supreme court observed that in *Razor v. Hyundai*¹³³ it rejected that requirement and held that a finding of unconscionability may be based on either procedural or substantive unconscionability, or a combination of both.¹³⁴ In addressing the alleged unconscionability of the class action arbitration clause, the supreme court noted that the issue hinges on the totality of the circumstances.¹³⁵ The court observed that procedural unconscionability refers to a situation where a term is so difficult to find, read or understand that the plaintiff cannot fairly be

126. *Id.* at 4–5, 857 N.E.2d at 255.

127. *Id.* at 5, 857 N.E.2d at 255.

128. *Id.* at 16, 857 N.E.2d at 261 (citing *Perry v. Thomas*, 482 U.S. 483, 489 (1987); quoting *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984)).

129. *Id.* at 15–17, 857 N.E.2d at 259–61.

130. *Id.* at 18, 857 N.E.2d 261–62.

131. *Id.* at 18, 857 N.E.2d 262.

132. *Id.* at 21, 857 N.E.2d at 263.

133. *Razor v. Hyundai*, 222 Ill. 2d 75, 854 N.E.2d 607 (2006).

134. *Kinkel*, 223 Ill. 2d at 21, 857 N.E.2d at 263 (citing *Razor*, 222 Ill. 2d at 99, 854 N.E.2d at 622).

135. *Id.* at 22, 857 N.E.2d at 264 (citing *Razor*, 222 Ill. 2d at 100, 854 N.E.2d at 622).

said to have been aware he was agreeing to it.¹³⁶ The court noted that it found procedural unconscionability in *Razor*, in which found

[w]hatever other context there might be in which a contractual provision would be found to be procedurally unconscionable, that label must apply to a situation such as the case at bar where plaintiff has testified that she never saw the clause; nor is there any basis for concluding that plaintiff could have seen the clause, before entering into the sale contract.¹³⁷

The court found a degree of procedural unconscionability here because the contract did not advise plaintiff that she would have to pay the cost of arbitration.¹³⁸ The court did not find that rose to the level of procedural unconscionability, but declared it to be a factor which would be considered in combination with the court's findings on substantial unconscionability.¹³⁹

As to substantive unconscionability, the supreme court applied the following definition:

Substantive unconscionability concerns the actual terms of the contract and examines the relative fairness of the obligation assumed. Indicative of substantive unconscionability are contract terms so one-sided as to oppress or unfairly surprise an innocent party, an overall imbalance in the obligations and rights imposed by the bargain, and significant cost price-disparity.¹⁴⁰

Applying that definition, the court found the issue to be whether a waiver of the ability to bring a class claim was so onerous or oppressive as to be substantively unconscionable when: (1) the waiver contained a mandatory arbitration provision, but failed to declare the cost of arbitration to the claimant, (2) the cost would be \$125, and (3) the underlying claim involved actual damages of \$150.¹⁴¹

After reviewing a number of class action waiver cases from other jurisdictions, the court discerned a pattern that other state courts have determined that a class action waiver should not be held unconscionable if the plaintiff had a meaningful opportunity to reject the contract term or if the

136. *Id.* (citing *Razor*, 222 Ill. 2d at 100, 854 N.E.2d at 622 (which cited with approval *Frank's Maintenance v. C.A. Roberts Co.*, 86 Ill. App. 3d 980, 989, 408 N.E.2d 403 (1st Dist. 1980))).

137. *Id.* at 25, 857 N.E.2d at 265 (citing *Razor*, 222 Ill. 2d at 102, 854 N.E.2d at 623).

138. *Id.* at 26–27, 857 N.E.2d at 266.

139. *Id.*

140. *Id.* at 28, 857 N.E.2d at 267 (quoting *Maxwell v. Fidelity*, 187 Ariz. 82, 89, 902 P.2d 51, 58 (1995)).

141. *Id.* at 28–29, 857 N.E.2d at 267.

agreement is not burdened by other features limiting the ability of the plaintiff to assert a claim in a cost-effective manner.¹⁴²

The court concluded that Cingular “sought to insulate itself from liability to a potential class of customers by enforcing a class action waiver in its standard” cell phone contract.¹⁴³ Under circumstances that included a contract of adhesion that required a customer to arbitrate all claims but did not reveal the cost of arbitration and contained a liquidated damages clause that allegedly operated as an illegal penalty, the court found the class action waiver to be unconscionable and unenforceable.¹⁴⁴ As the court observed, those provisions operate together to create a situation where the cost of vindicating the claim was so high that a customer’s only cost effective means of obtaining relief would be as a member of a class action.¹⁴⁵ The court also held that under the facts and circumstances of this case, the waiver was unconscionable because it contained a contract of adhesion that failed to inform the customer of the cost of arbitration in either a judicial or arbitral forum.¹⁴⁶ Finally, the court also held that the offending clause was severable from the arbitration clause.¹⁴⁷

IV. RESTRICTIVE COVENANTS

Illinois has long recognized the freedom of parties to contract as they wish.¹⁴⁸ Special rules have evolved regarding restrictive covenants in employment contracts. In Illinois, restrictive covenants in doctors’ contracts have not been held void as against public policy. In some states they are, such as Colorado, Delaware and Massachusetts.¹⁴⁹ In those states, the legislatures have enacted statutes declaring them void as against public policy.¹⁵⁰ The Illinois Supreme Court was invited to follow suit and declare them void as against public policy in *Mohanty v. St. John Heart Clinic*, but declined to do so. In this case, the court addressed the question of whether restrictive covenants in physician employment contracts are void as against public policy.

142. *Id.* at 41, 857 N.E.2d at 275. (citing favorably *Klussman v. Cross Country Bank*, 36 Cal. Rptr. 3d 728, 738, 134 Cal. App. 4th 1283, 1296) (App. Div. 2005).

143. *Id.* at 42, 857 N.E.2d at 274–75.

144. *Id.*

145. *Id.*

146. *Id.* at 47–48, 857 N.E.2d at 278.

147. *Id.*

148. *Mohanty v. St. John Heart Clinic*, 225 Ill. 2d 52, 64, 866 N.E. 2d 85, 92 (citing *Vine Street Clinic v. Healthlink, Inc.*, 222 Ill. 2d 276, 856 N.E.2d 422 (2006)).

149. *Id.* at 68, 866 N.E.2d at 94.

150. *Id.*

The court distinguished this case from *Dowd & Dowd v. Gleason*,¹⁵¹ where it held that restrictive covenants in attorney employment contracts are void as against public policy.

Mohanty v. St. John Heart Clinic

Drs. Jyoti Mohanty and Raghu Ramadurai were hired by Dr. John Monteverde to work at the St. John Heart Clinic (the Clinic), an Illinois professional medical corporation he founded in 1978.¹⁵² Both doctors worked under the direction and supervision of Dr. Monteverde.¹⁵³ The employment contract for each doctor provided that each would be paid a percentage of his gross receipts. The employment for each doctor contained a restrictive covenant.¹⁵⁴ The contract for Dr. Ramadurai provided that he would not practice medicine for three years after leaving the Clinic within a two-mile radius of any Clinic office or at any of the four hospitals where the Clinic operated.¹⁵⁵ Dr. Mohanty's restrictive covenant was somewhat broader, providing that upon termination of the employment agreement he could not practice medicine within a five-mile radius of the Clinic or at any of the four hospitals for five years.¹⁵⁶ In May 2003, before leaving the clinic, both doctors filed complaints for declaratory relief, alleging their respective restrictive covenants were void as against public policy and unenforceable because Dr. Monteverde breached their employment contracts. Dr. Mohanty also alleged that his five-year, five-mile restrictive covenant was unreasonable and overbroad as to time and distance.¹⁵⁷ They alleged those restrictions were not necessary to protect the economic or business interests of the Clinic. The Clinic and Dr. Monteverde responded that they did not breach the contracts and denied that the restrictive covenants were void as against public policy or unreasonably broad as to time and distance. Defendants counterclaimed, seeking a temporary and permanent injunction against the doctors for violating the restrictive covenants.¹⁵⁸ The trial court granted a temporary restraining order.¹⁵⁹ After an extensive hearing, the trial court denied the preliminary

151. *Dowd & Dowd v. Gleason*, 181 Ill. 2d 460, 693 N.E.2d 258 (1998).

152. *Mohanty v. St. John Heart Clinic*, 225 Ill. 2d 52, 866 N.E.2d 85 (2006).

153. *Id.* at 58, 866 N.E.2d at 88.

154. *Id.* at 57, 866 N.E.2d at 88.

155. *Id.*

156. *Id.*

157. *Id.* at 58, 866 N.E.2d at 89.

158. *Id.* at 59, 866 N.E.2d at 89.

159. *Id.*

restraining order.¹⁶⁰ The court did not find sufficient proof of a material breach of contract.¹⁶¹ The court found the limitations as to time and distance were unreasonable under the facts of this case.¹⁶² The appellate court reversed, finding that the geographic restriction in the restrictive covenant was not unreasonable.¹⁶³ The court denied that all medical employment restrictive covenants were void as against public policy. The court did not reach plaintiffs' claim that defendants materially breached the employment contract, finding that issue was not ripe for review, as this was an interlocutory appeal of the order denying defendants' request for an injunction.¹⁶⁴ Having reversed, the court remanded with instructions that the preliminary injunction be granted, pending further hearings.¹⁶⁵

The supreme court addressed three issues: (1) whether restrictive covenants in physician employment contracts are void as against public policy, (2) whether the Clinic materially breached the employment, thereby relieving plaintiffs of their obligations under the restrictive covenants and (3) whether the restrictive covenants were overly broad as to time and distance.

Plaintiffs asserted that the court should follow its ruling in *Dowd & Dowd v. Gleason*,¹⁶⁶ where it held that restrictive covenants in employee covenants are void as against public policy.¹⁶⁷ However, the court pointed out that non-compete agreements in attorney employment contracts are prohibited by Rule 5.6 of the Illinois Rules of Professional Conduct.¹⁶⁸ That rule, the court notes, established the public policy in this state.¹⁶⁹ The court found no corresponding public policy statement regarding physician non-compete employment contracts.¹⁷⁰ Plaintiffs cited three states where courts found physician restrictive covenants to be void as against public policy, Colorado, Delaware and Massachusetts.¹⁷¹ But, the court said, legislation in those states has been enacted prohibiting physician restrictive covenants.¹⁷² Here, the court found it was not against public policy. In fact, it found that several reasons favor it.

160. *Id.* at 61, 866 N.E.2d at 90.

161. *Id.*

162. *Id.* at 61, 866 N.E.2d at 90-91.

163. *Id.* at 61-62, 866 N.E.2d at 91 (citing *Mohanty v. St. John Heart Clinic, S.C.*, 358 Ill. App. 3d 902, 832 N.E.2d 940 (1st Dist. 2005)).

164. *Id.* at 62, 866 N.E.2d at 91.

165. *Id.*

166. *Dowd & Dowd v. Gleason*, 181 Ill. 2d 460, 639 N.E.2d 358 (1998).

167. *Mohanty*, 225 Ill. 2d at 65-66, 866 N.E.2d at 93.

168. *Id.* at 66, 866 N.E.2d at 93.

169. *Id.*

170. *Id.*

171. *Id.* at 68, 866 N.E.2d at 94.

172. *Id.*

The court declared that the decision of whether physician restrictive covenants should be declared as against public policy in Illinois is a decision better left to the legislature.¹⁷³

The second issue the court addressed was whether there was a material breach by the Clinic which excused the doctors' obligations under the restrictive covenants.¹⁷⁴ The court found the trial court's decision that the Clinic did not commit a material breach of the employment contract in the manner in which it calculated the doctors' salaries was not against the manifest weight of the evidence.¹⁷⁵ Accordingly, plaintiffs could not succeed in their claim that they should not have to abide by the restrictive covenants due to a material breach of contract by the Clinic.¹⁷⁶

Regarding the final issue, whether the restrictive covenants were overbroad in their time and distance restrictions, the trial court had ruled that "the practice of medicine" aspect of the restrictive covenant was overbroad because the Clinic specialized in cardiac care and the doctor would not be competing with such a clinic by performing other medical services to their patients.¹⁷⁷ The supreme court was not persuaded. Agreeing with the appellate court that Dr. Monteverde was free to treat his patients for other conditions in addition to heart-related ailments, the restrictive covenant provision, as it relates to "the practice of medicine," was found by the court to be not unreasonable.¹⁷⁸ In addition, the court noted the doctors are free to practice medicine outside the five-mile limit, which covers a large territory, given the size of the Chicago metropolitan area.¹⁷⁹ Accordingly the supreme court affirmed the appellate court's ruling as to "the practice of medicine" issue.¹⁸⁰ The court next considered the restriction as to time. The court found the five-year restriction was not overbroad, noting that it took ten years for Dr. Monteverde to establish the Clinic as a successful cardiology practice.¹⁸¹ Under all the facts and circumstances of the case, the court did not find the temporal restriction of the employment contract to be unreasonable.¹⁸²

173. *Id.* at 68, 866 N.E.2d at 94-95.

174. *Id.*

175. *Id.* at 75, 866 N.E.2d at 94-95.

176. *Id.*

177. *Id.* at 76, 866 N.E.2d 98.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.* at 78, 866 N.E.2d 100.

182. *Id.*

V. WHETHER A CONTRACT IS VOID OR AMBIGUOUS AS A
MATTER OF LAW

As a general rule, parties are free to contract and their contracts will not be overturned unless they are prohibited by statute, e.g. contracts to perform an illegal act or contracts held void as against public policy. Whether a contractual provision was ambiguous and void as against public policy was the issue in *Progressive Universal Insurance Company of Illinois v. Liberty Mutual Fire Insurance Co.*¹⁸³ Whether a contractual provision was ambiguous and should be construed against the drafter was the issue in *Jewelers Mutual Insurance Company v. Firststar Bank.*¹⁸⁴

Progressive Universal Insurance Company of Illinois v. Liberty Mutual Fire Insurance Co.

Shirley Abinante allowed her son Ronald to drive her car, which was insured by Progressive Universal Life Insurance Company of Illinois (Progressive) to deliver pizzas for Casale Pizza, Inc.¹⁸⁵ Casale Pizza paid Ronald \$1.25 per pizza and gave him money for gas.¹⁸⁶ While delivering the pizza, he struck and injured pedestrian Mikhail Lavit, who sued Ronald and Casale Pizza.¹⁸⁷ Progressive defended Ronald under a reservation of rights.¹⁸⁸ Lavit received \$100,000 from his insurer, Liberty Mutual Fire Insurance Company (Liberty Mutual), the limits of their uninsured-motorist coverage.¹⁸⁹ Liberty Mutual demanded reimbursement of \$100,000 from Progressive.¹⁹⁰ Progressive brought a declaratory action in Du Page County claiming that it had no duty to defend or indemnify Ronald.¹⁹¹ Progressive moved for summary judgment asserting it had no duty to defend or indemnify Ronald due to an exclusion in the policy that provided no coverage for “including, but not limited to, delivery of food, or any other products.”¹⁹² Liberty Mutual filed a

183. *Progressive Universal Ins. Co. of Ill. v. Liberty Mut. Fire Ins. Co.*, 215 Ill. 2d 121, 828 N.E.2d 1175 (2005).

184. *Jewelers Mut. Ins. Co. v. Firststar Bank*, 213 Ill. 2d 58, 820 N.E.2d 411 (2004).

185. *Progressive*, 215 Ill. 2d at 124, 828 N.E.2d at 1177.

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.* at 125, 828 N.E.2d at 1178.

cross motion for summary judgment asserting that the exclusion was ambiguous and contrary to public policy.¹⁹³ In granting Progressive's motion and denying Liberty Mutual's cross motion for summary judgment the trial court found the food delivery exclusion to be both unambiguous and valid.¹⁹⁴ The appellate court agreed and affirmed the trial court decision, finding the provision to be unambiguous. However, the appellate court found it violated public policy relying on *State Farm Mutual Automobile Insurance Company v. Smith*.¹⁹⁵ The appellate court found the exclusion void and unenforceable for violating Section 7-317(b)(2) of the Illinois Safety Family Financial Responsibility Law.¹⁹⁶ That provision provides that an insurance policy "shall insure the person named therein and any other person using or responsible for the use of such motor vehicle or vehicles with the express or implied permission of the insured."¹⁹⁷

The appellate court reasoned that since Section 7-317(b)(2) required insurance companies to insure anyone who had the insured's permission to drive, the exclusionary provision in the insurance policy ran afoul of that statutory provision and was therefore void.¹⁹⁸ The issue before the supreme court was whether the appellate court erred in so holding.¹⁹⁹ Provisions such as that are known as "omnibus clauses," which the supreme court has held must be read into every auto insurance policy.²⁰⁰ The purpose behind the state's mandatory insurance requirement is to protect the public by securing payment for their damages.²⁰¹ Accordingly, a provision in a contract for auto insurance that ran afoul of those statutory requirements would be void.²⁰² Mindful of the freedom of parties to contract as they wish, the court exercises its power to declare a private contract void sparingly.²⁰³ The court observed that whether a contract provision is contrary to public policy depends on the facts of each case.²⁰⁴ The court distinguished this case from *State Farm v.*

193. *Id.*

194. *Id.*

195. *Progressive Universal Ins. Co. of Ill. v. Liberty Mut. Fire Ins. Co.*, 347 Ill. App. 3d 411, 416-18, 806 N.E.2d 1224, 1228-29 (2d Dist. 2004).

196. *Progressive*, 215 Ill. 2d at 126-27, 828 N.E.2d at 1179 (citing 625 ILL. COMP. STAT. 5/7-317(b)(2) (West 2000)).

197. *Id.* at 127, 828 N.E.2d at 1179 (quoting 625 ILL. COMP. STAT. 5/7-317(b)(2)).

198. *Progressive*, 347 Ill. App. 3d at 416-18, 806 N.E.2d at 1228-29.

199. *Progressive*, 215 Ill. 2d at 127, 828 N.E.2d at 1179.

200. *Id.* at 129, 828 N.E.2d at 1180.

201. *Id.* (citing *State Farm v. Smith*, 197 Ill. 2d 369, 376, 757 N.E.2d 881, 885 (2001)).

202. *Id.* (citing *American Country Ins. Co. v. Wilcoxon*, 127 Ill. 2d 230, 241, 537 N.E.2d 284, 289 (1989)).

203. *Id.*

204. *Id.* at 130, 828 N.E.2d at 1180.

Smith.²⁰⁵ In *Smith*, a pedestrian was injured when a car valet for a casino negligently operated the insured's car.²⁰⁶ In that case, the State Farm policy provided that no coverage would be provided when the car was used by "any person employed in or engaged in any way in a car business."²⁰⁷ In that case the court found that the contract provision was void because it conflicted with the mandatory language of the "state omnibus clause."²⁰⁸ The appellate court ruling in this case had relied on *Smith* in finding the contract void.²⁰⁹ The supreme court noted that whether a contract provision is void as against public policy depends on the facts and circumstances of each case and proceeded to distinguish the *Smith* case, which was specifically limited to its own particular facts and circumstances.²¹⁰ The court noted the business exclusion in *Smith* applied only to permissive users.²¹¹ That disparate treatment, the court determined, ran afoul of the statutory "omnibus provision," which required auto insurance policies to cover not only insured drivers but also those who they permit to drive.²¹² Here, the court noted, there was no disparate treatment of permittees.²¹³ Under the agreed upon terms of the insurance contract in this case, neither Abbinante nor her permittee was allowed to use the car to deliver food.²¹⁴ Since permissive drivers of the car are not treated differently than the insured, the contract in this case does not run afoul of the "omnibus clause" as the contract did in the *Smith* case.²¹⁵ The court found that nowhere does the law forbid parties to an insurance contract from agreeing to exclude certain risks from insurance coverage.²¹⁶

Jewelers Mutual Insurance Co. v. Firststar Bank

The court in *Jewelers Mutual Insurance Co. v. Firststar Bank*²¹⁷ addressed the issue of the exculpatory clause in a bank's safety deposit box rental

205. *Id.* at 130–35, 828 N.E.2d at 1180–1183.

206. *Id.* at 130, 828 N.E.2d at 1180 (citing *State Farm v. Smith*, 197 Ill. 2d 369, 371, 757 N.E.2d 881, 882 (2001)).

207. *Id.* at 130, 828 N.E.2d at 1181.

208. *Id.*

209. *Id.* at 132, 828 N.E.2d at 1182.

210. *Id.* at 133, 828 N.E.2d at 1182.

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.* at 133, 828 N.E.2d at 1182–83.

215. *Id.* at 133–34, 828 N.E.2d at 1182–83.

216. *Id.* at 136, 828 N.E.2d at 1184.

217. *Jewelers Mut. Ins. Co. v. Firststar Bank*, 213 Ill. 2d 58, 820 N.E.2d 411 (2004).

agreement.²¹⁸ More than \$1 million in diamonds and jewelry was stolen from three safety deposit boxes in one of defendant's Chicago branches.²¹⁹ The lease contained the following two-sentence paragraph:

1. It is understood that said bank has no possession or custody of, nor control over, the contents of said safe and that the lessee assumes all risks in connection with the depositing of such contents, that the lessee assumes all risks in connection with the depositing of such contents, that the sum mentioned is for the rental of said safe alone, and that there shall be no liability on the part of said bank, for loss of, or injury to, the contents of said box from any cause whatever unless lessee and said bank enter into a special agreement in writing to that effect, in which case such additional charges shall be made by said bank as the value of contents of said safe, and the liability assumed on account thereof may justify. The liability of said bank is limited to the exercise of ordinary care to prevent the opening of said safe by any person not authorized and such opening by any person not authorized shall not be inferable from the loss of any of its contents.²²⁰

Clearly, the two sentences contradict each other. In the second sentence, the bank promises to use ordinary care to prevent unauthorized access and gets the customer to agree that unauthorized access cannot be inferred from the loss of contents alone. In the first sentence, however, the bank secures agreement from the customer that the bank has no control of the contents of the box and the customer assumes liability for loss of contents "from any cause whatever"

Suit was filed on behalf of the victims of the theft against the bank for breach of contract and negligence.²²¹ The negligence count was dismissed based on the *Moorman* Doctrine.²²² The trial court also granted summary judgment to the bank pursuant to the exculpatory clause in the contract.²²³ The appellate court affirmed the dismissal of the negligence count under *Moorman*.²²⁴ The appellate court reversed the summary judgment ruling, finding the exculpatory clause unenforceable for two reasons.²²⁵ Since the paragraph in question contained two sentences which contradicted each other, the appellate court found the contract ambiguous and resolved that ambiguity

218. *Id.* at 59, 820 N.E.2d at 412.

219. *Id.*

220. *Id.* at 59–60, 820 N.E.2d at 412–413.

221. *Id.* at 60, 820 N.E.2d at 423.

222. *Id.* at 60, 820 N.E.2d at 413 (citing *Moorman Mfg. Co. v. Nat'l Tank Co.*, 91 Ill. 2d 69, 88–89, 435 N.E.2d 442 (1982)).

223. *Id.*

224. *Id.*

225. *Id.* at 60–61, 820 N.E.2d at 413–14.

against defendant bank, since it drafted the contract.²²⁶ Second, since the contract defined the relation between the parties as landlord and tenant, the court found the clause that excused the landlord from liability for his own negligence as void as against public policy.²²⁷ Since defendant had admitted that it allowed unauthorized access to the safety deposit boxes, the court reversed and ordered the trial court to grant partial summary judgment against the bank on liability and remanded it for the trial court to determine damages.²²⁸

Since the supreme court decided the case on the first ground, it did not address the landlord/tenant issue.²²⁹ The supreme court defined the issue as whether the bank breached the contract and whether it can exculpate itself from liability for breach of that express obligation assumed in the contract.²³⁰ As to the exculpatory clause, the court found that at the heart of the parties' agreement was the bank's promise to exercise ordinary care to prevent unauthorized access to the safety deposit boxes.²³¹ The court held that defendant cannot promise to act in a certain manner in one part of a contract and then exculpate itself from liability for breach of that very promise in another part of the contract.²³²

VI. ARBITRATION CLAUSE

In *Eric Jensen v. Quick International*,²³³ the court addressed issues relating to the arbitration clause in a franchise agreement entered into when the franchisor was not properly registered under Illinois law. In *Melena v. Anheuser Busch*,²³⁴ the court addressed the significance of an arbitration clause appearing in an employee handbook.

226. *Id.* (citing *Jewelers Mut. Ins. Co. v. Firststar Bank*, 341 Ill. App. 3d 14, 18, 792 N.E.2d 1,4 (1st Dist. 2003)).

227. *Id.* (citing the Landlord and Tenant Act, 765 ILL. COMP. STAT. 705/.01 *et seq.* (West 2002)).

228. *Id.* at 60–61, 820 N.E.2d at 413–14.

229. *Id.* at 69, 820 N.E.2d at 417.

230. *Id.* at 64, 820 N.E.2d at 415.

231. *Id.* at 65, 820 N.E.2d at 415.

232. *Id.* (citing *Shorr Paper Prod. v. Aurora Elevator*, 198 Ill. App. 3d 9, 13–14, 555 N.E.2d 735, 737–38 (2d Dist. 1990)).

233. *Jensen v. Quik Int'l*, 213 Ill. 2d 119, 820 N.E.2d 462 (2004).

234. *Melena v. Anheuser-Busch Inc.*, 219 Ill. 2d 135, 847 N.E.2d 99 (2006).

Eric Jensen v. Quik International

Jensen contracted with Quik to operate a franchise in Illinois.²³⁵ The arbitration clause in the franchise contract provided: “Any controversy or claim arising out of or relating to this agreement or its breach, including, without limitation, any claim that this agreement or any of its parts are invalid, illegal or otherwise voidable or void, shall be submitted to arbitration. . . .”²³⁶ At the time the franchise agreement was signed, Quik was not registered as a franchisor with the Illinois Attorney General, as required by the Franchise Disclosure Act of 1987.²³⁷ Quik sought to stay the proceeding and compel arbitration under to the arbitration clause.²³⁸ Plaintiff filed a cross-motion to stay the arbitration until the trial court’s ruling on staying the litigation.²³⁹ The trial court denied defendant’s motion to stay the trial proceeding and granted Jensen’s motion to stay the arbitration.²⁴⁰ The appellate court affirmed, holding that the issue of whether the parties had entered into an enforceable contract is not arbitrable because whether a contract existed is a question of law for the court to decide.²⁴¹

The supreme court began its analysis by noting that the Franchise Disclosure Act requires Quik to be registered with the Illinois Attorney General to enter into a franchise contract with Jensen.²⁴² Because Quik was not properly licensed and registered, Jensen can seek rescission of the contract, the court noted.²⁴³ The court pointed out that all disputes under the contract must go to arbitration.²⁴⁴ The court declared the issue to be whether Jensen could pursue his rescission action in state court under state law or whether that rescission should be pursued before an arbitrator under the arbitration clause.²⁴⁵ The court observed that for one to seek to rescind a contract, there must be a contract to rescind.²⁴⁶ In addition, the court noted, had the legislature intended that a franchise contract entered into in violation of the Franchise Disclosure

235. *Jensen*, 213 Ill. 2d at 120, 820 N.E.2d at 463.

236. *Id.* at 121, 820 N.E.2d at 463.

237. *Id.* at 120, 820 N.E.2d at 463, (citing 815 ILL. COMP. STAT. 705/5 (West 2002)).

238. *Id.*

239. *Id.* at 121, 820 N.E.2d at 464.

240. *Id.*

241. *Id.* at 122, 820 N.E.2d at 464 (citing *Jensen v. Quik Int’l*, 345 Ill. App. 3d 713, 801 N.E.2d 1124 (1st Dist. 2003)).

242. *Id.* at 122–23, 820 N.E.2d at 464.

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.* at 127, 820 N.E.2d at 466–67 (citing with favor *Cusamano v. Norele Health Care, Inc.*, 239 Ill. App. 3d 648, 607 N.E.2d 246 (4th Dist. 1992)).

Act to be unenforceable, it could have so provided.²⁴⁷ Accordingly, the Illinois Supreme Court held that whether plaintiff can rescind the franchise agreement on the ground that defendant was not properly registered under the Franchise Disclosure Act is subject to arbitration under the arbitration clause in the contract.²⁴⁸

Melena v. Anheuser Busch

In *Joann Melena v. Anheuser-Busch, Inc.*,²⁴⁹ plaintiff alleged that her employer, Anheuser-Busch fired her in retaliation for filing a worker's compensation claim.²⁵⁰ Plaintiff had been employed at the Anheuser-Busch distribution center in Mount Vernon for one year when, in February 2000, her employer announced that all employees would be subject to its new "Dispute Resolution Program."²⁵¹ The program provided that "by continuing or accepting an offer of employment" the employee agreed that employer-employee disputes would be referred to an arbitrator.²⁵²

In April 2001, plaintiff signed an acknowledgement that she received an employee handbook, which detailed the arbitration procedures.²⁵³ In September 2002 plaintiff filed a workers' compensation claim for a work-related injury.²⁵⁴ Anheuser-Busch fired Joann Melena in March 2003, while she was receiving unemployment benefits.²⁵⁵ Plaintiff filed her complaint for retaliatory discharge in Jefferson County in May 2003.²⁵⁶ The appellate court affirmed the trial judge's denial of the defendant employer's motion to dismiss the complaint because of the arbitration clause.²⁵⁷ The appellate court held that to be enforceable, an arbitration agreement such as this must have been entered into knowingly and voluntarily.²⁵⁸ The appellate court declared that under all the facts and circumstances of this case "even if the plaintiff entered the agreement knowingly, she did not do so voluntarily."²⁵⁹ Indeed, the appellate court added that it had "serious reservations" about whether an arbitration

247. *Id.* at 127, 820 N.E.2d at 467.

248. *Id.* at 129, 820 N.E.2d at 468.

249. *Melena*, 219 Ill. 2d 135, 847 N.E.2d 99.

250. *Id.* at 137, 847 N.E.2d at 101.

251. *Id.* at 138, 847 N.E.2d at 101.

252. *Id.* at 139, 847 N.E.2d at 101.

253. *Id.* at 139, 847 N.E.2d at 102.

254. *Id.* at 140, 847 N.E.2d at 102.

255. *Id.* at 139, 847 N.E.2d at 101.

256. *Id.*

257. *Id.*

258. *Melena v. Anheuser-Busch Inc.*, 352 Ill. App. 3d 699, 707, 816 N.E.2d 826, 832 (2004).

259. *Id.* at 707, 816 N.E.2d at 833.

agreement, as a condition of employment, could ever be considered voluntary.²⁶⁰

The court addressed the issue of whether the “Dispute Resolution Program” constituted an agreement binding on the employee.²⁶¹ Plaintiff argued that for the arbitration agreement to be enforceable, she must have entered into the agreement knowingly and voluntarily.²⁶² The employer contended that, as with any other contract, the arbitration agreement should be judged on fundamental contract law.²⁶³ Since resolution of this issue involved application of the Federal Arbitration Act (FAA),²⁶⁴ the supreme court looked to federal decisions.²⁶⁵ The court observed that the United States Supreme Court has held that employment contracts are subject to the terms of the FAA, except for those employment contracts that deal with transportation workers.²⁶⁶ The Illinois Supreme Court observed that Section 2 of the FAA provides, in part, that a written arbitration clause “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”²⁶⁷

The court noted that although the Supreme Court has not directly addressed this issue, it has allowed rights guaranteed by statutes, similar to workers’ compensation claims, to be subject to mandatory arbitration.²⁶⁸ The Supreme Court requires that a valid agreement to arbitrate statutory claims must be clear and unmistakable.²⁶⁹ The arbitration agreement in this case seemed to meet that test to the extent that it included “retaliation claims for legally protected activity and/or whistle blowing.”²⁷⁰ Although the Supreme Court had not addressed the issue of a “knowing and voluntary” waiver standard, several federal courts of appeals have.²⁷¹ In fact, the Illinois Appellate Court decision in this case rejecting the arbitration agreement relied on the standard of a “knowing and voluntary” waiver standard, favored by the

260. *Id.*

261. *Melena*, 219 Ill. 2d at 140–41, 847 N.E.2d at 102.

262. *Id.* at 141, 847 N.E.2d at 103.

263. *Id.*

264. 9 U.S.C. § 1 (1994).

265. *Melena*, 219 Ill. 2d at 141–42, 847 N.E.2d at 103.

266. *Id.* at 142, 847 N.E.2d at 103 (citing *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001)).

267. *Id.* at 142, 847 N.E.2d at 103 (quoting from 9 U.S.C. § 2 (1994)).

268. *Id.* at 144, 847 N.E.2d at 105 (citing *Mitsubishi v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985)) (upholding arbitration agreement relating to claims under the Sherman Act).

269. *Id.* at 144, 847 N.E.2d at 105 (citing *Wright v. Universal Maritime Serv. Co.*, 525 U.S. 70 (1998)).

270. *Id.* at 145, 847 N.E.2d at 105 n.2.

271. *Id.*

Ninth Circuit.²⁷² The appellate court opinion conceded that the Ninth Circuit approach it followed has not “garnered universal support.”²⁷³

The Illinois Supreme Court noted that the United States Court of Appeals for the Seventh Circuit, as well as several other circuits, have rejected the “knowing and voluntary” waiver standard. Instead, several circuits hold that the determination of the enforceability of a mandatory arbitration agreement between employer and employee turns on fundamental principles of contract law.²⁷⁴ As a clear exposition of this standard, the court quoted the following language:

The nondrafting . . . party consents to arbitration by signing the form or by manifesting assent in another way, such as by performance of the contract. That the consumer did not read or understand the arbitration clause does not prevent the consumer from consenting to it. Nor does the consumer’s ignorance that an arbitration clause is included on the form. These are statements of ordinary, plain-vanilla contract law.²⁷⁵

Essentially, the Illinois Supreme Court applied the objective theory of contract interpretation to arbitration clauses in employment contracts. The supreme court followed that interpretation of arbitration clauses favored in the Seventh and several other circuits because it found that approach to be “more faithful to the FAA.”²⁷⁶ Having concluded that the regular principles of contract law applied in this case, the court then looked to state contract law in analyzing the contract question.²⁷⁷ Under Illinois law, the elements of a contract are offer, acceptance and consideration.²⁷⁸ The court found that Anheuser-Busch’s introduction of its Dispute Resolution Program constituted its offer.²⁷⁹ By continuing to work there, Joann Melena accepted the offer and supplied the necessary consideration.²⁸⁰ Since the elements of a contract were present here, the court found that the retaliatory discharge claim should have been referred to arbitration. Further, the court noted that since the arbitration

272. *Id.* at 145, 847 N.E.2d at 105 (citing *Prudential Insurance Company v. Lai*, 42 F. 3d 1299 (9th Cir. 1994)).

273. *Melena*, 352 Ill. App. 3d at 705, 816 N.E.2d at 831.

274. *Melena*, 219 Ill. 2d at 146, 847 N.E.2d at 106.

275. *Id.* at 147, 847 N.E.2d at 107 (quoting S. Ware, *Arbitration Clause, Jury-Waiver Clauses, and other Contractual Waivers of Constitutional Rights*, 67 LAW & CONTEMP. PROBS. 167, 171 (Winter/Spring 2004)).

276. *Id.* at 149, 847 N.E.2d at 107.

277. *Id.* at 151, 847 N.E.2d at 109.

278. *Id.* at 151, 847 N.E.2d at 109 (citing *Steinberg v. Chicago Med. Sch.*, 69 Ill. 2d 320, 329, 371 N.E.2d 634, 639 (1977)).

279. *Id.* at 152, 847 N.E.2d at 109.

280. *Id.*

clause did not require the employee to forego any right she could exercise at trial, arbitration could actually serve the same remedial and deterrent effects as litigation.²⁸¹

VII. STUDENT LOAN CONTRACT

People of the State of Illinois ex rel. the Department of Public Health v. Thelma E. Wiley, M.D.

In *People of the State of Illinois ex rel. the Department of Public Health v. Thelma E. Wiley, M.D.*, the court addressed several issues of contract law, including the doctrine of settlement and compromise of a claim.²⁸² The Illinois Department of Public Health (Department) sued Thelma E. Wiley, M.D., in Cook County for violating her scholarship contracts she made with the Department under the Family Practice Residency Act.²⁸³ The trial court granted summary judgment for the Department, and the appellate court affirmed.²⁸⁴ During each of her four years in medical school, plaintiff signed a scholarship contract with the Department.²⁸⁵ The total amount borrowed was \$52,465.²⁸⁶ The contracts provides that in exchange for receiving the scholarship funds, the new doctor would serve as a full-time primary care physician in direct patient care in a geographical area designated by the Department as having a shortage of doctors.²⁸⁷ The start date was within 30 days after being licensed as a physician, although it could be deferred until after the new doctor completed an approved residency program.²⁸⁸ The agreement provided that if the student failed to fulfill the terms of the contract, the Department would be entitled to receive three times the amount of the scholarship.²⁸⁹ This term was required by the Family Practice Residency Act.²⁹⁰ Under the scholarship contract, Dr. Wiley's service obligation had been deferred until August 1992, 30 days after she completed her residency at

281. *Id.* at 156, 847 N.E.2d at 111.

282. *People of the State of Ill. ex rel. the Dep't of Public Health v. Thelma E. Wiley, M.D.*, 218 Ill. 2d 207, 843 N.E.2d 259 (2006).

283. *Id.* at 210, 843 N.E.2d at 261 (citing 110 ILL. COMP. STAT. 935/1 *et seq.* (West 2002)).

284. *Department of Pub. Health v. Wiley*, 348 Ill. App. 3d 809, 810 N.E.2d 614 (2004).

285. *Wiley*, 218 Ill. 2d at 211, 843 N.E.2d at 262.

286. *Id.*

287. *Id.*

288. *Id.*

289. *Id.* at 212, 843 N.E.2d at 262.

290. *Id.*; 110 ILL. COMP. STAT. 935/1-10.

the University of Illinois Medical Center in Chicago.²⁹¹ Rather than fulfill her service obligation, Dr. Wiley decided to pursue a three-year postresidency fellowship at the University of Illinois at Chicago.²⁹² The Department notified Wiley that because she had not fulfilled her service obligation, she owed \$157,396, three times the amount of the scholarships.²⁹³ Wiley negotiated a payment plan of \$100 per month for 24 months, followed by \$4305 per month for 36 months.²⁹⁴ She failed to sign that agreement and send in the first payment on time in July 1993.²⁹⁵ In August 1993, the state comptroller's office began withholding \$524.56 per month, 25% of her monthly paycheck, toward the \$157,395 she owed the Department.²⁹⁶ In September 1993, Wiley finally sent in her signed copy of the installment agreement with the first \$100 payment.²⁹⁷ She had no excuse for being late.²⁹⁸ The Department declined to proceed under the earlier \$100 per month installment agreement because Wiley was already in arrears.²⁹⁹ The involuntary withholding was continued.³⁰⁰

Wiley contended that, under the doctrine of compromise and settlement, the Department was precluded as a matter of law from pursuing claims it previously settled with her.³⁰¹ As the court noted, the doctrine of compromise and settlement envisions a situation where there is an agreement that a substitute performance will be accepted in place of what was previously claimed by each side.³⁰² The court determined that was not the situation in this case. The court concluded that the initial installment agreement reached in this case was a payment plan contemplated by the scholarship contracts and not a settlement of the claim.³⁰³ As the court pointed out, Wiley agreed that if she did not fulfill her service obligation, she would pay the Department three times the scholarship funds received, or \$157,395.³⁰⁴ She also agreed that if that occurred she would enter into another contract with the Department to set forth

291. *Wiley*, 218 Ill. 2d at 211, 843 N.E.2d at 262–63.

292. *Id.* at 212, 843 N.E.2d at 263.

293. *Id.* at 214, 843 N.E.2d at 264.

294. *Id.* at 215–16, 843 N.E.2d at 265.

295. *Id.* at 216, 843 N.E.2d at 265.

296. *Id.*

297. *Id.*

298. *Id.* at 216–17, 843 N.E.2d at 265.

299. *Id.* at 217, 843 N.E.2d at 265.

300. *Id.*

301. *Id.* at 221, 843 N.E.2d at 267.

302. *Id.*

303. *Id.* at 221, 843 N.E.2d at 268.

304. *Id.* at 221–22, 843 N.E.2d at 268.

the terms of the payment.³⁰⁵ That installment agreement provided that Wiley would be provided with a full release “upon payment in full.”³⁰⁶

Wiley also contended that the trial court should not have granted summary judgment against her for Count I of the complaint, breach of contract, asserting that there were material questions of fact concerning whether she breached those contracts.³⁰⁷ The court affirmed the trial and appellate courts’ findings that there was no dispute Wiley breached the scholarship contracts by not beginning her service obligation within 30 days of the completion of her residency and by not working as a full-time primary care physician in a designated shortage area.³⁰⁸ Wiley also argued that the treble damages provision was an impermissible penalty unenforceable at common law.³⁰⁹ The court declined to address Wiley’s common law argument because the treble damages provision in the state scholarship contract was required by statute.³¹⁰ The treble damages provision in the contract was imposed in accord with state law as required under the Family Practice Residency Act.³¹¹

VIII. CLASS ACTIONS

Avery v. State Farm

In *Avery v. State Farm*,³¹² a class action filed in Williamson County, plaintiffs, on behalf of State Farm policyholders in 48 states, filed claims for breach of contract and statutory consumer fraud, and also sought declaratory and injunctive relief.³¹³ The breach of contract claim was heard by a jury and the remaining claims were decided by a simultaneous bench trial.³¹⁴ This article will address the breach of contract claim. The jury found breach of contract by State Farm.³¹⁵ The appellate court affirmed.³¹⁶ At the heart of the breach of contract was the matter of OEM and non-OEM crash parts. The initials refer to “Original Equipment Manufacturer” parts or “OEM” crash

305. *Id.*

306. *Id.*

307. *Id.* at 222–23, 843 N.E.2d at 269.

308. *Id.* at 224, 843 N.E.2d at 269.

309. *Id.* at 227–28, 843 N.E.2d at 271.

310. *Id.*

311. *Id.* (citing 110 ILL. COMP. STAT. 935/10 (West 2002)).

312. *Avery v. State Farm*, 216 Ill. 2d 100, 835 N.E.2d 801 (2005).

313. *Id.* at 109, 835 N.E.2d at 810.

314. *Id.*

315. *Id.*

316. *Id.*

parts.³¹⁷ Crash parts refer to parts for the car's outer shell.³¹⁸ OEM parts are new parts made by or on behalf of the auto manufacturer.³¹⁹ The second category "involved aftermarket parts made by companies not affiliated with [the] original equipment manufacturers."³²⁰ The gist of the breach of contract claim was that State Farm breached its contractual agreement to "restore [its] policyholders' cars to their pre-loss condition by using parts of like kind and quality" by replacing damaged OEM parts with non-OEM parts, which were alleged by plaintiffs to be inferior.³²¹ The trial court applied Illinois law to the breach of contract claim.³²² The verdict form given to the jury asked, in pertinent part, "[d]o you find that defendant State Farm failed to perform its obligations under the contract and breached its contract with the plaintiff class?"³²³ The jury found for plaintiffs and awarded \$256,180,000 for breach of contract.³²⁴

In reversing, the Illinois Supreme Court found that it was error for the trial court to instruct the jury on breach of contract as if there were one uniform contract when there was no single uniform contract for all members of the class.³²⁵ As the court observed, "[t]he starting point of any contract analysis is the language of the contract itself."³²⁶ There were multiple policy forms which differed materially.³²⁷ Since this was the case, the court found that the plaintiffs, from forty-eight states, never should have been certified as a class in the first place.³²⁸ The court found that the verdict could not have been upheld as to some subclasses because plaintiffs failed to properly establish damages.³²⁹ Plaintiffs calculated damages of \$243,700,000 for instances in which the State Farm estimates specified non-OEM parts, without regard to whether OEM or non-OEM parts were actually installed.³³⁰ The court pointed out that this was a speculative approach to damages. Actual damages might vary from case to case based on what kind of equipment or parts were

317. *Id.* at 110, 835 N.E.2d at 810.

318. *Id.*

319. *Id.*

320. *Id.* at 110, 835 N.E.2d at 811.

321. *Id.*

322. *Id.* at 114–15, 835 N.E.2d at 814–15.

323. *Id.* at 121, 835 N.E.2d at 817.

324. *Id.*

325. *Id.* at 135, 835 N.E.2d at 824.

326. *Id.* at 129, 835 N.E.2d at 821 (citing *Church v. Gen. Motors Corp.*, 73 F.3d 795, 799 (7th Cir. 1996); *Dugan v. Smerwick Sewerage Co.*, 142 F.3d 398, 403 (7th Cir. 1998)).

327. *Id.*

328. *Avery*, 216 Ill. 2d at 135, 835 N.E.2d at 824.

329. *Id.* at 145, 835 N.E.2d at 830.

330. *Id.*

installed, rather than based on what the estimate specified.³³¹ This was apparently done by plaintiffs, the court found, at the cost of accuracy to keep the largest possible class intact.³³² As the court observed, “[a]ccordingly, any determination as to which plaintiffs were eligible for damages would require the examination of each class member’s vehicle and repair. Such an undertaking, however, would mean that questions affecting individual class members would predominate over common questions, destroying the commonality required for a class action.”³³³

331. *Id.* at 144–45, 835 N.E.2d at 830.

332. *Id.* at 147, 835 N.E.2d at 831.

333. *Id.*