No. 116362

IN THE
SUPREME COURT OF ILLINOIS

MORTON S. GOLDFINE and ADRIENNE M. GOLDFINE,

Plaintiffs-Appellees,

v.

BARACK, FERRAZZANO, KIRSCHBAUM & PERLMAN, PETER J. BARACK, DENNIS A. FERRAZZANO, HOWARD J. KIRSCHBAUM, CHARLES H. PERLMAN, RAY G. REZNER, DEBRA A. CAFARO, DAVID H. NADOFF, THOMAS H. PAGE, DAVID R. SELMER, ROBERT E. SHAPIRO, WENDI SLOANE WEITMAN, and JILL ANN COLEMAN,

Defendants-Appellants.

On Appeal from the Illinois Appellate Court, First Judicial District, No. 1-11-1779
There Appealed from the Circuit Court of Cook County,
County Department, Law Division, Case No. 05-L-6360
The Honorable Dennis J. Burke, Judge Presiding

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POINTS AND AUTHORITIES

ARGUMENT

Introduction

The Chicago Bar Association ("CBA") and the Illinois State Bar Association ("ISBA") offer this amicus brief to advise the court of the views of *amici* on the policy considerations and practical ramifications on the practicing bar and clients if the appellate court were to be affirmed.[1] While this case presents a number of serious and compelling issues, and while the nature and amount of the liability visited upon the defendant firm and lawyers is of concern, this brief of amici is confined to the single question of whether the provisions for prejudgment 10% interest and the award of attorneys' fees provided as remedies to a securities purchaser under § 815 ILCS 5/13A of the Illinois Securities Law ("ISL") can serve as the basis for additional recovery over and above compensatory damages to the purchaser in a legal malpractice suit brought against an attorney on a claim of mishandling an ISL claim.

Here, on an actual loss of $1.3 million, by the levying of those remedies against the defendant attorneys, the recovery sought against them has been estimated by plaintiffs to be between $18 and $21 million.

The CBA and the ISBA, on behalf of their members, urge that (a) it was not the intent of the legislature to have prejudgment interest and attorneys' fees imposed upon lawyers who themselves had not violated the ISL, (b) that the ISL cannot be properly interpreted to arrive at that result, (c) that the appellate court's analysis of this issue is not

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[1] The motion of amici for leave to file this brief is being submitted contemporaneously with the brief.

in alignment with the important public policies identified by this Court in *Tri-G, Inc. v. Burke, Bosselman & Weaver*, 222 Ill.2d 818 (2006), and (d) the appellate court's result is contrary to 735 ILCS 5/2-1115 which forbids the recovery of punitive, exemplary, vindictive or aggravated damages in legal malpractice cases.

The CBA and the ISBA express their concern that permitting those recoveries against lawyers in malpractice actions will reduce the willingness of lawyers to handle ISL claims, limit the availability of lawyers to handle such claims in many parts of the state, and adversely affect the amount of premium charged to all lawyers on their legal malpractice policies, to the detriment of both lawyers and potential clients. In addition, imposition of those damages will otherwise adversely affect the well-being of any affected lawyers for many years in light of the long pendency of these types of claims in conjunction with the extraordinary aggregation of these interest and fee penalty provisions, especially in comparison to the common amounts of insurance limits purchased by lawyers.

I. THE PREJUDGMENT INTEREST AND ATTORNEY FEE-SHIFTING PROVISIONS OF THE ILLINOIS SECURITIES LAW ARE IN THE NATURE OF PENALTIES OR PUNITIVE DAMAGES.

Section 12 of the ISL, 815 ILCS 5/12, defines the conduct or omissions which constitute "violations" of the ISL. Among the actions constituting violations are the filing of false and misleading documents, transactions which work a fraud or deceit upon a party to a securities transaction, obtaining money through untrue or misleading statements, and employing any scheme to defraud, either directly or indirectly. Section 13A of the ISL exempts from the interest and attorneys' fees provisions certain arguably more benign types of prohibited conduct, including a failure to file particular documents with the secretary of state and the content of certain denominated reports.

Section 13A of the ISL provides that sales made in violation of the Act shall be voidable at the election of the purchaser. That section further provides that participants in such a sale are liable to the purchasers not only for the full amount paid for the security, but also in the event of a lack of specification of an interest rate, for interest at 10% upon the offer of tender to the seller. It is further provided that "if the purchaser shall prevail in any action brought to enforce any of the remedies provided in this subsection, the court shall assess costs together with the reasonable fees and expenses of the purchaser's attorney against the defendant." 815 ILCS 5/13A(2).

Case law has already recognized (a) that the ISL is directed at egregious conduct and (b) that the additional remedies provided in § 13A are in the nature of penalties. This Court has stated over a span of many decades that the purpose of the enactment of the Illinois Securities Act was "to protect the public from the dishonesty, incompetence, ignorance, and irresponsibility of persons engaging in the business of disposing of securities of uncertain value whereby the inexperienced and confiding are likely to suffer loss." *Foreman v. Holsman*, 10 Ill.2d 551, 553 (1957), citing *Stewart v. Brady*, 300 Ill. 425, 442 (1921). *Foreman* further said:

> "The fact that upon rescission one may recover attorney's fees, as well as the purchase price, indicates that this civil remedy is intended to afford an additional punishment for an offending party. ...
>
> The threat of a possible civil action, with its attendant penalty of attorney's fees, helps protect the public against the sale of unlicensed securities."

Foreman v. Holsman, 10 Ill.2d 551, 553-4 (1957).

The judicial recognition of the ISL as being of a penal or punitive nature has been consistent through time. *Gowdy v. Richter*, 20 Ill.App.3d 514, 525 (1st Dist. 1974) (Illinois

law is "clear" in allowing only statutory, not equitable, defenses in a case involving the Act, "the penal character of the statute negates the utilization" of equitable defenses.); *Condux v. Neldon*, 83 Ill.App.3d 575, 577, 584 (1st Dist. 1980) ("The rescission provision of the Act is a penalty, designed to compel promoters to register their stock. ... The Securities Law is powerful medicine, with a substantial capacity to do harm, and is to be applied only where indicated, never wantonly. It was not the legislature's purpose to burden commerce, terrorize honest business men, and assure full employment for securities lawyers; and the Act should not be over-extended to achieve only these ends."); and *Jacobs v. James*, 215 Ill.App.3d 499, 505 (1st Dist. 1991) ("The goals of the fee-shifting provision of the Securities Law are to (1) penalize defendants for illegal acts, and (2) remove the expense of legal representation as an obstacle to plaintiffs bringing suit.").

In analyzing whether the interest and fee-shifting provisions of the ISL should be regarded as compensatory damages, on one hand, or punitive, exemplary, vindictive or aggravated damages on the other, those plain statements of this and other courts can usefully be compared against the circumstance that the law generally regards plaintiffs as having been "made whole" even though they most often do not obtain prejudgment interest and even less frequently recover their attorney's fees.

"As a general rule, prejudgment interest is recoverable only where authorized by the agreement of the parties or by statute." *Kouzoukas v. Retirement Board*, 234 Ill.2d 446, 474 (2009). "As a general rule, the Interest Act does not allow prejudgment interest for lawsuits based on tort claims." *Cress v. Recreation Services, Inc.*, 341 Ill.App.3d 149, 196 (2nd Dist. 2003).

It is a commonplace that fee-shifting is out of the ordinary:

> "Illinois follows the 'American rule,' which prohibits prevailing parties from recovering their attorney fees from the losing party, absent express statutory or contractual provisions. [Citation] Accordingly, statutes which allow for such fees must be strictly construed as they are in derogation of the common law. ..."

Sandholm v. Kuecker, 2012 IL 111443, ¶ 64.

Of course, exceptions to those general rules can be identified, where either statutes, or limited rules of law, create exceptions to the foregoing principles. But the prevailing wide scope of operation of those two principles has two points of relevance to the analysis here: (a) it illustrates that the provisions for prejudgment interest and fee shifting in the ISL do not provide compensatory (made whole) damages, but rather should be regarded as constituting punitive, exemplary, vindictive or aggravated damages, and (b) in the view of *amici*, great caution is called for in the resolution of the issue now before the court because of the potential danger of the spread of the resolution of this issue by the appellate court to other areas of the practice of law, which will be referenced below.

II. THE PREJUDGMENT INTEREST AND FEE-SHIFTING PROVISIONS OF THE ILLINOIS SECURITIES LAW DO NOT APPLY IN LEGAL MALPRACTICE ACTIONS AGAINST LAWYERS WHO DID NOT VIOLATE THE ISL. THE LEGISLATURE DID NOT INTEND A CONTRARY RESULT. IN ADDITION, THOSE PENAL PROVISIONS FALL WITHIN THE PROHIBITION OF 735 ILCS 5/2-1115 WHICH FORBIDS THE RECOVERY OF PUNITIVE, EXEMPLARY, VINDICTIVE OR AGGRAVATED DAMAGES IN LEGAL MALPRACTICE CASES.

The CBA and the ISBA intend here to stay within the banks of their role as *amici*, and to fulfill their goal of offering their advice to the court on the impact of this case upon lawyers and the provision of legal services. But in the service of that purpose, because this is a legal malpractice case directly against lawyers, *amici* respectfully suggest that some

comment upon the substantive merits of the case are necessary because the question for consideration is, at root, the potential liability of lawyers.

Section 12 of the ISL defines conduct on the part of persons involved in security transactions which constitutes a violation of the ISL. The offending conduct is proscribed against those involved in securities transactions or those persons in a position to influence, coerce or mislead persons engaged in the preparation of financial statements. The ISL, by its terms, does not apply against lawyers representing parties to a securities transaction dispute. Section 13 of the ISL, in establishing "private and other civil remedies," states that those remedies are available against the issuer of the security, other persons on behalf of whom the sale was made, and other specified entities "who shall have participated or aided in making the sale." Among the remedies established by that section are the prejudgment interest and fee-shifting provisions at issue before the court.

Neither the definition of violations nor the remedies established make direct, indirect or even implicit mention of the availability of those remedies against lawyers or any other collateral person. In *Tri-G, Inc. v. Burke, Bosselman & Weaver*, 222 Ill.2d 218 (2006), this Court held that the interest provision of 735 ILCS 5/2-1303, providing for postjudgment interest, must be strictly cabined to its terms and could not serve as the basis of an award of such interest on a hypothetical judgment that should have been obtained by the defendant lawyers. Here, the ISL must be at least as strictly construed and held in the same fashion to not apply because of the lack of any statutory language extending the Act to this situation. Section 13A of the Act has been held to be in derogation of the common law, thereby requiring strict construction. *Delaney v. Happel*, 185 Ill.App.3d 951, 954 (1st Dist. 1989). When so construed, the language of the ISL cannot be read to support the

imposition of these damages against an attorney who did not commit the violations defined in the Act.

In the absence of language in the Act extending those remedies against non-violator attorneys, a plaintiff in a legal malpractice action such as here must seek to extend the language of the Act in some manner. In that effort, the plaintiff is left to attempt to argue legislative intent. To the extent that a court is willing to entertain that effort in the absence of express supportive language, resort to prior judicial interpretations of the ISL negates the possibility of the conclusion that the legislature intended to extend these remedies to apply against attorneys.

As set out in Section I of this Brief, the purpose of the ISL is to protect the public from dishonest and incompetent acts of "persons engaging in the business of disposing of securities." *Foreman v. Holsman*, 10 Ill.2d 551, 553 (1957). The ISL "is powerful medicine, with a substantial capacity to do harm," which is "designed to compel promoters" to perform in accordance with the ISL. *Condux v. Neldon*, 83 Ill.App.3d 575, 577 (1st Dist. 1980). There is no language in the Act which can serve as a reasonable springboard for an argument that the legislature intended that the "powerful medicine" of the ISL be administered to lawyers not involved in any with the underlying prohibited conduct.

There is a separate reason why prejudgment interest and attorneys' fees may not be levied against lawyers. 735 ILCS 5/2-1115 provides that "in all cases, whether in tort, contract or otherwise, in which the plaintiff seeks damages by reason of legal, medical, hospital, or other healing art malpractice, no punitive, exemplary, vindictive or aggravated damages shall be allowed." That statute could not be more comprehensive in its intended

scope of application ("in all cases...") or in the damages barred ("punitive, exemplary, vindictive or aggravated"). *Amici* will leave to the parties the development of the case law interpreting that provision and the arguments as to its application here. *Amici* suggest that upon consideration of that body of case law, in conjunction with the judicial descriptions of the purpose of the ISL contained in Section I of this Brief as being intended to constitute "punishment" and having a "penal character," that the imposition of prejudgment interest and the shifting of fees must be regarded to be punitive, exemplary and aggravated, thereby coming within the prohibition of § 2-1115.

A necessary corollary of plaintiffs' argument that these damages are not barred by § 2-1115 because they are not punitive damages is that such damages must therefore be regarded as compensatory in plaintiffs' view. This Court quoted with approval from the brief of the defendant law firm in *Tri-G* language which is worthy of equal application here:

> "A lost opportunity to punish does not become 'compensatory' and should not be recoverable from someone other than the person for whom the punishment was intended."

Tri-G, Inc. v. Burke, Bosselman & Weaver, 222 Ill.2d 218, 265 (2006).

III. IMPOSING THESE PREJUDGMENT INTEREST AND FEE-SHIFTING PROVISIONS, INTENDED FOR SECURITIES VIOLATORS, ON ATTORNEYS WILL HAVE BOTH OBVIOUS AND PERNICIOUS DETRIMENTAL EFFECTS ON LAWYERS, THE PRACTICE OF LAW, AND THE PROVISION OF LEGAL SERVICES TO CLIENTS.

The heart of this matter is that the *amici* wish to write plainly for the court of the unjust and helpless position in which lawyers would be placed if the prejudgment interest and fee-shifting provisions of the ISL are applied against lawyers. Plaintiffs' actual loss here, $1.3 million, must be compared to the $18 to $21 million which plaintiffs claim

entitlement to, bolstered by the actions of the courts below. Thus, plaintiffs seek far more than 10 times their actual loss.

When a client approaches an attorney with a problem to be resolved, the attorney can gain an accurate general sense of the economic size of the client's problem and the corresponding exposure to the attorney in the event that the matter is not properly handled. That assessment informs many things, including not only the amount of work to be anticipated and the fair fee to be charged, but even the more fundamental question as to whether the attorney will agree to undertake the case. The attorney can also manage the conduct of the case in light of the economic reality of the situation presented.

Here, though, and in most similar situations if the opinion below is permitted to stand, the attorneys are rendered powerless to manage their exposure. This dispute has been ongoing since 1991, approximately 22 years as of the time of the writing of this Brief. *Amici* presume that the parties will advise the Court in detail of how that time has been spent, wisely or not, in the conduct of this litigation. Regardless of the details, it cannot be said that it has been handled with any degree of dispatch. Yet, plaintiffs claim that 10% interest has been accruing the entire time, and that it continues even now. The same is to be said of the attorneys' fees. While this goes on, the attorneys are helpless to stanch those accumulating penalties.

This is to be contrasted with the seller or other party in the security transaction. The interest and fee provisions at issue are provided along with the rescission remedy. The seller, upon demand, is in a position to rescind the transaction and restore the money received. The attorney, in helpless contrast, cannot rescind, and does not have the proceeds of the transaction. Further, the attorney is not in a position to determine the actual loss

involved until the litigation is completed. All of this is to be compared with the intended operation of the statute. When the statute is applied according to its terms, it operates only on parties to the transaction who are in a position to rescind, to disgorge, and to stop both the accumulation of interest and the incurring of attorneys' fees.

The availability of malpractice insurance and its relative limits are fair matters for consideration here. The amount of the judgment sought by plaintiffs in this case swamps the malpractice limits of the great preponderance of lawyers in Illinois. Further, the judgment sought exceeds by so many multiples the actual loss that an attorney could not make a rational business decision as to whether to undertake the case in light of his or her limits of malpractice insurance. The response of insurers may well be to increase premiums across the board or to exclude coverage for securities work. This Court noted the warning in that regard sounded by the defendant firm in *Tri-G. Tri-G, Inc. v. Burke, Bosselman & Weaver*, 222 Ill.2d 218, 266 (2006). The availability of malpractice insurance for the protection of clients is a matter of concern to this Court. Supreme Court Rule 756(e).

The oppressive and deleterious effects of the pendency for many years of these types of claims and an ultimate judgment deriving from them, upon reflection, can be seen to extend over much of a lawyer's career. This is especially troublesome in light of the inescapable conclusion that relatively confined losses will inexorably grow without the ability of the lawyers to stop them. As noted, this controversy has been proceeding for 22 years; the dispute in *Tri-G* began 24 years prior to the arrival of that problem before this Court. 222 Ill.2d 218, 253 (2006). Because of the liability of all partners for the actions of any lawyer in the firm, the problems caused by the imposition of these damages extends

for not only decades, but also to many persons not actively involved in the case. The economic ramifications of that are manifold.

If the appellate opinion is found to be the law, the willingness of lawyers to handle securities cases will be called into serious question. That will apply even to matters which, initially, might not be large in size. Actions on the part of insurers might also dictate that outcome. The availability of lawyers willing to handle these matters in many parts of the state might be eliminated, thereby decreasing the availability of legal services.

What is before this Court is the award of fees and interest under one particular statute. The decision in this case with respect to that statute is of concern to Illinois lawyers. However, it is foreseeable that if these damages are to be imposed upon lawyers, that other statutory instances might give rise to additional similar problems in the future. See, for example, 815 ILCS 505/10a (award of attorneys' fees against defendants found liable for violation of the Illinois Consumer Fraud Act); 215 ILCS 5-155 (award of attorneys' fees plus 60% of the amount of recovery against insurers); 820 ILCS 115/14 (award of attorneys' fees plus 2% per month on the amount of unpaid or underpaid wages); and 740 ILCS 23/5(c) (attorneys' fees to prevailing plaintiffs under the Illinois Civil Rights Act). While those statutes are not at issue here, if the appellate court's analysis is permitted to stand, further problems for the practicing bar and the provision of legal services may well follow.

Returning essentially to the point of beginning, *amici* conclude by noting that the task before the court is one of statutory interpretation. Because the terms of the ISL do not, by themselves, establish a right in plaintiffs, they must ask the court to engage in interpretation. In doing so, this Court takes into account the purpose of the legislation, and

gives meaning to the words of the statute in light of that purpose, and in light of prior judicial interpretations of the statute. *Sandholm v. Kuecker*, 2012 IL 111443, ¶ 43-45.

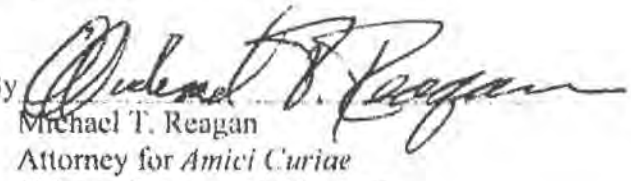
In *Tri-G*, this Court recognized many of the policy matters set out above, and found those policy considerations to be supportive of the court's decision there. This Court cited with approval the opinion of the Supreme Court of California in *Ferguson v. Lieff, Cabraser, et al.*, 69 P.3d 965 (Cal. 2003):

> "[A]s the *Ferguson* court discussed, allowing malpractice plaintiffs to recover lost punitive damages would exact a societal cost. Exposing attorneys to such liability would likely increase legal malpractice premiums, cause insurers to exclude coverage for these damages, or discourage insurers from providing professional liability insurance in the jurisdiction. This financial burden on attorneys would probably make it more difficult and costly for consumers to obtain legal services, or to obtain recovery for legal malpractice. Further, there is no compelling reason to take these risks. ... Rather, a plaintiff is made whole by compensatory damages...."

Tri-G v. Burke, Bosselman & Weaver, 222 Ill.2d 218, 260 (2006).

Amici respectfully suggest that application of the consideration of these policy considerations, the wording of the statutes, and principles of statutory interpretation result in the conclusion that the prejudgment interest and fee-splitting provisions of the Illinois Securities Law are not properly applied in legal malpractice actions.

Respectfully submitted,

By 
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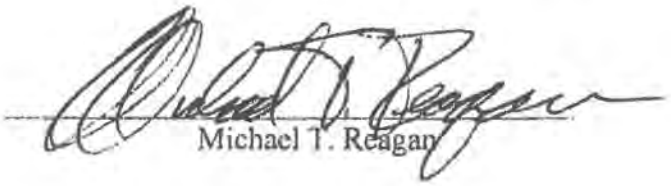
CERTIFICATE OF COMPLIANCE WITH RULE 341

The undersigned hereby certifies that this Brief complies with the form and length requirements of Supreme Court Rules 341(a) and (b). The length of this brief, excluding the appendix, is 13 pages.



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