

Consumer Fraud Takeaways From 7th Circ. 'Zestimates' Ruling

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A consumer fraud class action must be grounded on allegations of false or deceptive statements of fact. Opinions, including estimates clearly labeled as estimates, do not constitute statements of fact that can support a consumer fraud class action.

In *Patel v. Zillow Inc.*,^[1] the U.S. Court of Appeals for the Seventh Circuit recently confirmed this demarcation between fact and opinion in a case involving Zillow's well-known "Zestimates" of property values. But the authorities cited in that case show that this issue can be complicated, particularly where the opinion appears alongside other allegedly deceptive language or where the speaker intends the buyer to rely on an opinion as a statement of fact.

Zillow, an online real estate marketplace, offers Zestimates, estimated values for parcels of real estate generated by applying an algorithm to public data. Zillow discloses on its website that it does not inspect any properties and that its Zestimates might be inaccurate.

Vipul Patel discovered that the Zestimate for his property was lower than his asking price. He requested that Zillow either modify the Zestimate or take it down. After Zillow refused, he brought a putative class action against Zillow, asserting claims under the Illinois Uniform Deceptive Trade Practices Act and the Illinois Consumer Fraud and Deceptive Business Practices Act. The district court granted Zillow's motion to dismiss. Patel appealed, and the Seventh Circuit, in an opinion written by Judge Frank Easterbrook, affirmed.

The Seventh Circuit ruled that the trade practices and consumer fraud acts deal with statements of fact, "while Zestimates are opinions, which canonically are not actionable."^[2] Zillow's refusal to "correct" or take down a particular estimate, moreover, "does not make a Zestimate less an opinion."^[3] And Patel's selective request to remove the Zestimate for his property would not benefit the real estate market, because, "[i]n general, the accuracy of algorithmic estimates cannot be improved by plucking some numbers out of the distribution



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or 'improving' others in ways that depart from the algorithm's output. The process is more accurate, overall, when errors are not biased to favor sellers or buyers." [4]

But the two Illinois state court decisions cited by the Seventh Circuit in support of its ruling show this issue can be more complicated than simply showing challenged language involves an opinion or estimate. On the one hand, in *Sampen v. Dabrowski*, [5] the court held that, where a property appraisal report was clearly represented to be an estimate of property value, the report expressed an opinion and did not constitute an actionable misrepresentation.

In the other cited decision, *Hartigan v. Maclean Hunter Publishing Corp.*, [6] the court differentiated between nonactionable statements "clearly labeled as an opinion" and other statements that, in context, could support a claim of consumer fraud.

In *Hartigan*, the Illinois attorney general sued the publisher of a book containing vehicle pricing information ("Red Book"). According to the attorney general, "by falsely advertising that 'Red Book' contain[ed] 'official used car valuations,' that the information contained in 'Red Book' is 'complete,' 'current,' 'dependable,' 'impartial,' 'accurate,' and 'reliable' and that 'Red Book' provides 'average finance,' 'average wholesale,' and 'average retail' values," the publisher violated the Illinois trade practices and consumer fraud acts. [7]

The attorney general also advanced allegations about the publisher's "failure to base valuations on thorough studies of the relevant used car market, the failure to inform subscribers and the public that 'Red Book' does not report actual market values, the failure to inform subscribers and the public that valuations reported in 'Red Book' are merely subjective estimates, and the failure to compile and utilize sufficient information from which accurate vehicle valuation data can be derived." [8]

The court concluded that while "the prices allegedly contained in 'Red Book' [were] not in themselves deceptive," the prices became deceptive "in light of defendants' characterization of them as 'official,' 'average,' and 'accurate,' etc." [9] And accepting the attorney general's allegations as true, a number of other statements in "Red Book" could constitute actionable misrepresentations, if they were later proved to be false, including: (1) the representations that "Red Book" is an "official" and "recognized authority"; (2) statements that the prices reported in "Red Book" are "complete, dependable, impartial, accurate, and current"; and (3) statements that reported prices are "average" values. [10]

Also “the failure to inform subscribers, users, and the public that ‘Red Book’ does not report actual market values but rather reports subjective estimates of prices for automobiles” could constitute an actionable omission, “because the actual nature of the reported prices is not otherwise apparent.”[11]

The district court in *Patel v. Zillow* cited another federal district court case addressing similar issues. In *Brown v. Skyline Furniture Manufacturing Inc.*,[12] a former employee (Terrence Brown) sued Skyline Furniture for fraud. The former employee alleged that Skyline represented to him that stock in the company was worth only \$15 per share, that he sold the stock back to Skyline based on that representation, but that the stock was worth more than \$15 a share.[13]

The district court ruled that Brown had adequately alleged a false statement of material fact. The court recognized that “[g]enerally, an expression of opinion does not constitute a statement of fact and therefore cannot support an action for fraud. Statements as to the value of property are often treated as expressions of opinion and, if so intended and understood, cannot give rise to a fraud claim.”[14]

There is an important exception, however, where the opinion “is made as a statement of fact for the listener to rely upon.”[15] The district court ruled that the trier of fact could reasonably conclude that the representations as to the value of the shares was not an opinion but a misrepresentation of fact.

Attorneys defending consumer fraud class actions must be aware of the dichotomy between fact and opinion, because an opinion or estimate — even an allegedly false one — cannot support a fraud-based claim. The *Zillow* case represents a pithy and user-friendly precedent on this important limitation. But this line of authority shows that the issue can be much more complicated, depending on the specific representations delivered along with the opinion or estimate.

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[1] No. 18-2130, 2019 WL 491797 (7th Cir. Feb. 8, 2019).

[2] 2019 WL 491797, at *2.

[3] *Id.*

[4] *Id.*

[5] 584 N.E.2d 493, 495-99 (Ill. App. Ct. 1991).

[6] 457 N.E.2d 480, 487 (Ill. App. Ct. 1983).

[7] *Id.* at 482.

[8] *Id.* at 482-483.

[9] *Id.* at 487.

[10] *Id.* at 486-487.

[11] *Id.* at 487.

[12] No. 17-cv-1244, 2017 WL 2536590 (N.D. Ill. June 12, 2017).

[13] 2017 WL 2536590, at *1.

[14] *Id.* at *2.

[15] *Id.* (citation omitted).