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New Jersey Hospital Not Liable Under State Consumer Fraud Act

Thomas O'Connor

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by Thomas O'Connor

In ***Hampton Hospital v. Bresan*, 672 A.2d 725, (N.J. Super. Ct. App. Div. 1996)**, the Superior Court of New Jersey, Appellate Division, held that the parents of a child who received psychiatric treatment at Hampton Hospital ("Hampton") could not sue Hampton under provisions of the New Jersey Consumer Fraud Act ("Act"). Hampton initiated the suit in an attempt to collect the balance of an unpaid bill from the defendants, Joseph and Lynn Bresan ("Bresans"). The bill was for psychiatric treatment of the Bresans' suicidal teenage son. The Bresans filed a counterclaim, maintaining that Hampton violated the Act during the course of treatment of their son.

Hospital denied request for early discharge

Lawrence Bresan, the defendants' seventeen-year-old son, attempted suicide by ingesting a large dose of sleeping pills in May of 1991. Lawrence's mother admitted him to a hospital for treatment. After physical recovery, Lawrence began out-patient psychiatric treatment. During this treatment, his psychiatrist suggested that Lawrence enter a thirty day in-patient program at Hampton. Successful completion of Hampton's program was designed to last thirty days–if the patient entered on a voluntary basis and if the patient was judged fit to be for discharge at the end of that period. The health insurance policy of Lawrence's mother would cover her son's stay for up to thirty days, but she remained responsible for paying the deductible. The Bresans decided to admit Lawrence on May 12, 1991.

During the admitting process, Lawrence and his parents signed a Voluntary Admission Notice which included a clause stating that "[a]ll voluntary patients have the right to request discharge," but reserved the following clause for the hospital:

> "Upon receipt of the notice, Hampton staff have 48 hours to assess the patient's condition and make appropriate plans for discharge or continued treatment. If the patient's condition so warrants, Hampton staff may seek involuntary commitment."

Despite making encouraging progress at the start of his treatment, Lawrence decided to terminate the program after three weeks in order to spend his birthday at home. Hampton's policy regarding early discharge from this program mandates a written or oral request to one of the program's staff forty-eight hours in advance of discharge. Lawrence complied with this rule, but his request for a discharge was met with resistance on the part of the staff. Over the course of the next twenty-four hours, the staff persuaded Lawrence to withdraw his request for discharge and continue the program as scheduled. This discussion occurred without the consent or knowledge of the Bresans. Lawrence was released thirty days after his admittance to the in-patient program.

The preceding facts are not disputed by either party. Hampton's cause of action arose because the Bresans did not pay the full amount owed to the hospital. According to the Bresans, Hampton coerced Lawrence into staying the full thirty days in order to exhaust their insurance coverage; the Bresans argued that the hospital staff applied a revenue maximizing formula to determine Lawrence's discharge date. Hampton denied the accusation and maintained that the hospital retained Lawrence for thirty days under the specified duration of the program. Hampton further contended that it would have discharged Lawrence early had its diagnosis deemed an early discharge to be appropriate.

After unsuccessful attempts to collect payment, Hampton brought suit in Cape May County Special Civil Part. The Bresans successfully removed the suit to the Law Division and filed a counterclaim, maintaining that Hampton engaged in consumer fraud contrary to the Act. Once in the Law Division, Hampton filed a motion for summary judgment against the Bresans' counterclaim. Hampton contended that the Act did not cover its services and, consequently, that the Bresans had no basis in law for their counterclaim. The motion judge granted summary judgment in favor of Hampton, and the court of appeals affirmed that judgment. The court of appeals held that the Act did not cover Hampton's services because the services provided to Lawrence were not normal commercial transactions and because hospitals in New Jersey are regulated by the New Jersey Department of Health.

Issue is one of first impression

The *Hampton* case was the first in New Jersey to directly challenge the applicability of the Act to medical services. The court took two steps in its analysis of authorities. First, the court looked to prior New Jersey court proceedings for cases where New Jersey courts had ruled on the appropriateness of holding certain professions liable for sanctions under the Act. The court drew an analogy between those professions and the practice of medicine. The court then looked to Illinois courts as a source of persuasive authority for decisions dealing directly with the appropriateness of a consumer fraud action covering medical services.

The court examined both the language of the Act as well as a series of New Jersey court decisions to elucidate the definition and intent of the Act. The court concluded that the Act is primarily designed to protect consumers from unlawful business practices or advertisements intended to induce the consumer purchase of real estate or merchandise. Merchandise includes services as well as goods.

However, through a series of decisions, the New Jersey courts had excluded a number of professional services from the scope of the Act. In *Neveroski v. Blair*, 358 A.2d 473 (N.J. Super. Ct. App. Div. 1976), the court excluded real estate professionals from coverage and impliedly exempted attorneys and physicians. In *Vort v. Hollander*, 607 A.2d 1339 (N.J. Super. Ct. App. Div. 1992), the court explicitly exempted attorneys from coverage under the Act. In *Daaleman v. Elizabethtown Gas Co.*, 390 A.2d 566 (N.J. Super. Ct. App. Div. 1978), the court found public utilities to be covered by the Act, but the New Jersey Supreme Court reversed that decision in holding that public utilities are not covered by the Act.

After *Neveroski* but prior to the holding in *Vort*, the New Jersey legislature amended the Act to explicitly include the services of real estate professionals under its coverage. The *Hampton* court noted that the legislature did not take the opportunity to include the other professions mentioned in the *Neveroski* decision, e.g., attorneys. This lack of affirmative inclusion led the court to conclude that professionals not specifically mentioned in the language of the Act who provided services not normally considered to be of a commercial nature were not covered by the Act. This same reasoning proved instructive in the *Vort* court's analysis and ultimate ruling.

In both *Vort* and *Daaleman*, an independent body regulated the professions under analysis; therefore, the courts concluded that the Act did not bind these professions. Drawing an analogy between the regulation of attorneys and public utilities, the court in *Hampton* noted that hospitals in New Jersey are also regulated outside the Act. N. J. STAT. ANN. § 26:2H-1 mandates that the only body in charge of supervising health care services is the New Jersey Department of Health. This statute gives the Department of Health the power to impose remedies in cases where hospitals violate any of the governing regulations. The court ultimately held that medical professions are exempt from the Act, but it also looked to Illinois for persuasive authority specific to the medical professions.

Illinois decisions prove persuasive

Because the *Hampton* case was the first case in New Jersey to deal directly with coverage of medical services by the Act, the court looked for persuasive authority from other states. The New Jersey court looked to Illinois case law in part because Illinois has a similar Consumer Fraud Act and in part because the Illinois courts have decided cases in which health care providers have been sued for violations of the Illinois Consumer Fraud Act. In *Feldstein v. Guinan*, 499 N.E.2d 535 (Ill. App. Ct. 1986), an Illinois appellate court held that the Illinois Act does not apply to the practice of medicine. The court in *Feldstein*, like the *Hampton* court, drew a parallel between the practice of law and that of medicine. The *Feldstein* court looked to a previous case, *Frahm v. Urkovich*, 447 N.E.2d 1007 (Ill. 1983), which ruled that the practice of law was too distinct from commercial practices to be covered by the Illinois Consumer Fraud Act.

In *Evanston Hospital v. Crane*, 627 N.E.2d 29 (Ill. App. Ct. 1993), an Illinois appellate court again denied the application of the Illinois Consumer Fraud Act to medical services, based in part on the *Frahm* decision. On the basis of *Frahm*, the *Evanston Hospital* court "found a distinction between professional malpractice and the type of commercial misdeeds guarded against by the Consumer Fraud Act." This included the practice of medicine, which the court found to be outside the scope of the Illinois Consumer Fraud Act.

Counterclaim inappropriate

The *Hampton* court found the New Jersey and Illinois decisions to be consistent. The *Hampton* court reasoned that precedent existed in New Jersey to find certain professions as falling outside of the scope of the Act. The court found that the Illinois Consumer Fraud Act was quite similar in both intent and substance to the New Jersey Act and that there was persuasive authority in Illinois holding that medical professionals should be excluded from coverage under the Act. Based on these findings, the court granted summary judgment in favor of the plaintiff on the matter of the Bresans' counterclaim. Thus, the Bresans' may not sue Hampton under the New Jersey Consumer Fraud Act.

The Bresans also attempted to file a claim of duress. The Bresans maintained that they would have filed it at the appropriate time, e.g., with their counterclaim, but for the trial court's mistakes. The Bresans claimed that it was the trial court's duty to inform them that their claim under the Act was not valid so that they would have an opportunity to amend the duress claim. However, the court ruled that the Bresans' line of reasoning was "simply without merit."

Retailer at U.S.-Mexico border loses battle against Levi Strauss for misrepresentation and lost profits claims

by Heather Sullivan

In ***Griffith v. Levi Strauss & Co.*, 85 F.3d 185 (5th Cir. 1996)**, retailers brought suit against Levi Strauss & Co. ("Levi") for lost profits resulting from Levi's failure to inform the retailers that Levis distribution policy forbidding wholesale marketing allowed for an exception at the U.S.-Mexico border. The retailers sought recovery on five claims: (1) misrepresentation in violation of the Texas Deceptive Trade Practices Act; (2) breach of duty under Texas contract law; (3) negligent misrepresentation; (4) violation of the "catch-all" provision of the Texas Deceptive Trade Practices Act; and (5) misrepresentation as to the sponsorship, characteristics, or benefits of the goods or services. The district court dismissed the suit based on the claims of misrepresentation and breach of duty. The appellate court affirmed the lower court's rulings and rejected the additional claims raised on appeal.

The appellants, Ken and Renee Griffith ("Griffiths"), doing business as "Mr. Fashion," were retail merchants for Levi Strauss & Co. ("Levi"). Levi terminated the Griffiths' contract when the Griffiths began selling Levi's product on a wholesale basis. Under the contract, the Griffiths were bound to Levi's "distribution policy" which provided that Levi retailers may not sell Levi products to other resellers. If a Levi retailer transferred Levi products from an approved to non-approved location, Levi reserved the right to terminate the business relationship.

The Griffiths filed a lawsuit against Levi, alleging that Levi failed to inform them of the distribution policy's "border exception." The "border exception" provided that the standard rule prohibiting wholesale