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# Retailer at U.S.-Mexico Border Loses Battle Against Levi Strauss for Misrepresentation and Lost Profits Claims

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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 transactions did not apply to sales at the U.S.-Mexico border. The Griffiths claimed damages for lost profits, arguing that Levi's failure to inform them of the "border exception" deprived them of profits they could have earned because the Griffith's business was located at the U.S.-Mexico border.

## "Border exception" outside framework of agreement

The first claim of misrepresentation was based on Section 17.46(b)(12) of the Texas Deceptive Trade Practices Act ("DTPA"), which makes it an unlawful deceptive trade practice to represent "that an agreement confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law." Under this claim, the Griffiths asserted that Levi was liable for misrepresentation based on failure to apprise them of the border exception. The appellants also sought liability under Texas contract law and alleged that Levi breached the duty of good faith in performing the contract by omitting information pertaining to the border exception. The district court held that the border exception formed no part of the contract; thus, the court dismissed the suit for failure to state a claim upon which relief could be granted. The appellate court agreed and noted that under both claims, liability only arises if the false representation and the breach of duty have been included within the framework of the agreement. In other words, there must be some reference to the border exception in the contract according to the appellate court. The court recognized that no part of the Levi-Griffith contract mentioned the border exception; therefore, Levi did not misrepresent any term or breach any contractual duty.

On appeal, the Griffiths further alleged that Levi's failure to inform the Griffiths of the border exception constituted negligent misrepresentation. The Griffiths alleged that Levi misrepresented its distribution policy because Levi misguided them into believing that Levi prohibited them from selling Levi products on a wholesale basis. The court disagreed, stating that the distribution policy reserved Levi's right to terminate accounts with wholesale retailers and specifically provided Levi the option not to terminate. Therefore, Levi's representation about the distribution policy was not false because Levi permitted some retailers to sell on a wholesale basis without termination.

## "Catch-all" provision of Texas Deceptive Trade Practices Act not applicable to private cause of action

The Griffiths' next theory of recovery was based on the "catch all" provision in § 17.46(b) of the Texas DTPA which provides that "the term 'false, misleading, or deceptive acts or practices' includes, but is not limited to the following acts. . .." However, the court declared that this provision did not apply to the Griffiths because a claim must be specifically enumerated in § 17.46 to maintain a private cause of action. The court cited *Pennington v. Singleton*, 606 S.W.2d 682, 687 (Tex. 1980), in which the court examined the policies and legislative intent behind the DTPA. The *Pennington* court pointed out that § 17.44 of the DTPA provides that it "shall be liberally construed and applied to promote its underlying purposes, which are to protect consumers against false, misleading, and deceptive business practices, unconscionable actions, and breaches of warranty and to provide efficient and economical procedures to secure such protection." To discourage deceptive trade practices, the legislature included § 17.50 to provide a cause of action for mandatory treble damages. However, under § 17.50(a)(1)(A), a consumer may maintain a private cause of action only where "specifically enumerated in a subdivision of subsection (b) of section 17.46." Consequently, in *Griffith*, the court held that the "catch-all" provision claim failed because a private cause of action does not exist under the DTPA.

## Retailer fails to qualify as a "consumer" under Texas law

The Griffiths' final claim for relief alleged that Levi violated §17.46(b)(5) of DTPA by misrepresenting the sponsorship, characteristics or benefits of the goods or services. To recover under the DTPA, a plaintiff must establish that he is a "consumer." A "consumer" is "an individual . . . who seeks or acquires by purchase or lease, any goods or services." Eve L. Pouliot & William Christopher Carmody, *Deceptive Trade Practices Act*, 48 SMU L. Rev. 1113, 1114 (1995). Although a consumer is an "individual" within the statue, Texas recognizes that small businesses can be consumers. Texas is one of two states which specifically provides businesses a wide range of rights and privileges under its state's FTC Act. *Toward Greater Equality in Business Transactions: A*

*Proposal to Extend the Little FTC Acts to Small Businesses*, 96 HARV. L. REV. 1621, 1634 (1983). Thus, the DTPA applies to commercial transactions of businesses of all sizes. *Id.* at 1636. The reasoning behind this policy is that transactions involving wholesalers and retailers have elements of both consumer and business transactions. *Id.* at 1631. For example, small businesses often deal with the same suppliers that serve consumers, and the boundary between consumer goods and business purchases is not always clear. *Id.* Therefore, Texas recognizes that small businesses can be consumers; however, this classification only exists if the business acquires goods or services. *Id.*

The Griffiths did not acquire any goods or services and, therefore, did not fit the classification of "consumer." The appellate court looked to *Pennington* and determined that any misrepresentation by Levi, to be actionable, must pertain to the goods or services that the Griffiths acquired from Levi. In this case, the Griffiths sold their services as retailers to Levi; however, they acquired nothing from Levi. Therefore, the Griffiths did not fall within the scope of protection under the DTPA.

In conclusion, the appellate court affirmed the judgment of the district court in dismissing the complaint and holding that the Griffiths' were not entitled to recovery on any claim.

# *Alleged "kickbacks" do not violate RICO*

*by Philip J. Tortorich*

Recently, the Northern District of Illinois held that Mercury Finance Co. did not violate the Racketeer Influenced and Corrupt Organizations Act ("RICO") when it bought a finance contract at a lower rate than indicated to the customer. ***Perino v. Mercury Finance Co.*, 912 F. Supp. 313 (N. D. Ill. 1995).**

On May 20, 1993, Joseph Perino ("Perino") purchased a car from Mancari Chrysler Plymouth, Inc. ("Mancari"). Mancari arranged financing for Perino with Mercury Finance Company ("MFC"). Perino was informed that the annual percentage rate ("APR") from MFC was 41.04%. After Perino signed the contract, MFC purchased the contract from Mancari at a lower rate than that quoted to Perino. The two companies split the difference between the two rates; for example, if MFC purchased the contract back ("buy rate") from Mancari for roughly 30%, then MFC and Mancari would split the 10% difference between the APR and the buy rate. Neither MFC nor Mancari disclosed this discounted transaction to Perino. About a year after signing, Perino became disabled and unable to make regular payments on the installment contract. A few months later, MFC repossessed Perino's car even though Perino attempted to make payments through his disability insurance. Consequently, Perino filed a complaint in federal court which alleged that MFC violated RICO and the mail fraud statute along with several other state law claims. MFC moved to dismiss the complaint for failure to state a cause of action.

## RICO claim dismissed

The heart of Perino's claim was that MFC adopted a policy of entering into "secret agreements" with Mancari and other dealers in which: (1) MFC purchased retail installment contracts at a rate less than the rate at which the purchaser had originally signed; (2) MFC allowed the dealers to charge their customers more than MFC's interest rates to the dealers; (3) MFC and the dealers would split the difference; and (4) the dealers' customers would not be told that the dealers kept the difference. Perino contended that MFC's "kickback" scheme violated RICO. The court disagreed.

The court held that the defendant's conduct was neither fraudulent nor an illegal "kickback." Perino's allegations focused on the fact that MFC never disclosed the activity to the customer. The court noted that disclosure issues are resolved under the Truth-in-Lending Act ("TILA"), which does not require disclosures of the sort alleged. The TILA only requires that a customer be informed of: (1) the name of the creditor; (2) the amount financed; and (3) the APR. MFC fulfilled all of the required disclosures. Furthermore, the court held that the discounted sale was specifically authorized by, and in compliance with, the TILA.