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## *A federal district court holds distributor's failure to maintain manufacturer's quality control standards possible violation of federal trademark law*

by Paul Lukitsch

In *Anthony Distributors, Inc. v. Miller Brewing Co.*, 904 F. Supp. 1363 (M.D. Fla. 1995), a United States district court held that a distributor's unauthorized sale of date-expired products could infringe a brewer's trademark under federal trademark laws. In addition, in reviewing the distributor's motion to dismiss the brewer's claims, the court held that the "economic loss rule," a rule under Florida law which prevents a tort action from being maintained on purely economic damages, does not bar a brewer's fraud claim where damages include damages to the brewer's trademark.

Since May 1, 1983, Anthony Distributors ("Anthony") has been engaged in distributor agreements with Miller Brewing Company ("Miller"). These agreements grant Anthony the exclusive right to distribute Miller products, which bear the registered trademark of Miller, in the Tampa Bay and St. Petersburg markets of Florida. According to the terms set forth in the distributor agreements, Anthony is required to uphold Miller's strict quality control standards by preventing Miller products with expired date codes from reaching consumers. To ensure this control, Anthony must retrieve overage products from all retail accounts and destroy the product at their own expense.

Miller alleged that Anthony failed to comply with the required quality control standards set forth in the distributor agreements despite repeated warnings. Miller insisted that Anthony's failure to comply with these standards was due in part to a scheme by Anthony to generate profits. Miller took the position that Anthony, through its representatives, intended to fraudulently deliver overage products to retail accounts by "slamming, swapping, and dumping" the overage products to increase sales. Miller believed that Anthony's failure to comply with the quality control standards affected Miller's ability to exercise control over products bearing

the Miller trademark. Miller alleged that Anthony's sale of overage products damaged the goodwill of the Miller trademark and allowed Anthony to earn profits to which it was not entitled. Miller further alleged that Anthony breached the distributor agreement, thereby causing financial losses to Miller.

On May 8, 1995, Miller filed a seven count action in the district court against Anthony, alleging breach of contract, trademark infringement under federal law, fraud, and unjust enrichment. In response to these claims, Anthony filed a motion to dismiss, claiming that the economic loss doctrine barred Miller's tort claim of fraud because Miller had only sustained pecuniary damages but no property damages. Anthony further contended that federal trademark law did not apply because Anthony was an "authorized distributor."

In reviewing a motion to dismiss, the court looks only to the sufficiency of the plaintiff's complaint and accepts all allegations as true. Here, the district court allowed the claim based on federal trademark law, holding that Anthony's status as an authorized distributor offered no protection from trademark infringement. In addition, although Anthony sold genuine Miller products bearing the registered Miller trademark rather than an imitation or counterfeit product, the court held that Anthony's failure to follow Miller's quality controls rendered the product not genuine. Thus, the court found Anthony's sale of Miller's products without following the quality controls to be an infringement of Miller's registered trademark. The court also held that by suffering damage to their registered trademark, an intangible asset, Miller suffered damage to property. Therefore, the court found the "economic loss rule" inapplicable and allowed Miller's fraud claims to stand. However, the court denied Miller's unjust enrichment claim pursuant to the "economic loss rule," noting that

the damages for the breach of contract and the unjust enrichment claims were identical.

### **Genuine Miller Beer no longer genuine**

Anthony maintained that the federal trademark laws, the substantive basis for Miller's counts of trademark infringement, did not apply because of Anthony's status as an "authorized distributor" of Miller's products and because the contractual remedies available to Miller subsumed this claim.

The court looked to 15 U.S.C. § 1114, which states in part: "Any person who shall, without the consent of the registrant (a) use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale . . . of any goods or services on or in connection with which such use is likely to cause confusion . . . shall be liable in a civil action by the registrant . . ." 15 U.S.C. § 1114(1). The court evaluated Miller's allegation of trademark infringement under federal law by focusing on two elements of the statute. First, there must be a lack of consent by the owner of the registered trademark with regard to its use in commerce. Second, the product in question must be in the form of a reproduction or copy; trademark law does not apply to genuine products bearing the true mark of the registrant.

The court rejected Anthony's argument that its status as an "authorized distributor" of Miller products prevented it from being liable for trademark infringement. The court found that Anthony clearly lacked consent; further, the court held that there is nothing in the body of federal trademark law that would immunize Anthony from trademark infringement merely because of its status. In fact, the statute in question states that the actor may be "any person."

The court found Anthony's actions within the scope of the statute, with respect to the statutory requirement that the product be in the form of an imitation or copy. After discussing applicable case law, the court concluded that a product is not genuine unless it is manufactured and distributed under the quality controls established by the manufacturer. One purpose of a trademark is to serve as a quality assurance mechanism; thus, the trademark is associated with the quality of the product it symbolizes. In failing to maintain the standards established by Miller in selling Miller products to consumers,

the court concluded that Anthony violated the owner's trademark and infringed Miller's trademark under federal law. The court also noted that 15 U.S.C. § 1114(1) has been liberally construed and does not require literal interpretation of the terms "reproduction, counterfeit, copy, or colorable imitation . . ." This interpretation prevents misappropriation of the goodwill associated with the trademark, which may adversely affect the trademark owner and influence the public.

Therefore, the court rejected Anthony's argument and held that Miller may be entitled to cumulative damages resulting from the infringement of Miller's trademark as well as damages flowing from the breach of contract claim.

### **"Economic Loss Rule" does not bar the tort claim of fraud**

Anthony also moved for a dismissal of Miller's fraud claim based on the "economic loss rule." The economic loss rule bars any tort claim that is brought solely on the basis of economic damages. In addition, where an alleged breach of contract claim and a tort claim are brought under the same underlying facts and where the alleged tort does not cause harm distinct from that caused by the breach of contract, a plaintiff is barred from bringing a separate tort action.

Miller alleged that Anthony, by failing to follow Miller's strict quality control standards and fraudulently passing the products on to retailers under the Miller name, damaged the goodwill of Miller's trademark. Miller contended that a trademark is an intangible asset of a corporation and, as such, is Miller's property. Therefore, because Miller suffered property damage and economic damage from the alleged contractual breach, the court denied Anthony's motion to dismiss and sustained Miller's fraud claim.

### **Unjust enrichment claim denied**

In contrast, the court dismissed Miller's unjust enrichment claim based on the economic loss doctrine. In this case, the court held that Miller did not allege any damages to the goodwill of its trademark which would constitute a separate damage to property. Therefore, the court barred Miller's unjust enrichment claim under the "economic loss rule."

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## *New Jersey hospital not liable under state Consumer Fraud Act*

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,