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Mass. SJC Limits 93A Exposure in Patient Care Litigation

In *Darviris v. Petros*, 442 Mass. 274 (2004), the Supreme Judicial Court held that simple negligence in the provision of medical care does not constitute a violation of M.G.L. c. 93A, (the Consumer Protection Statute). The Court further held that although the Attorney General's regulations state that any violation of the Patients' Bill of Rights is a per se violation of the Consumer Protection Statute, a plaintiff must nonetheless prove that any such violation was an "unfair or deceptive" act or practice to constitute an actionable claim under 93A (which provides for recovery of multiple damages and attorneys fees). Such a finding may be made only upon a showing that the medical provider's actions were related to the business or entrepreneurial aspect of the provider's activities.

On Dec. 14, 1995, Darviris sought treatment from Dr. James Petros for rectal bleeding and pain. Petros recommended a simple surgical procedure, a fissurectomy, which involved cauterizing the anal fissures. Petros informed Darviris of the possible side effects of

that procedure, but said that such effects were unlikely and could be corrected by a subsequent procedure. Prior to the surgery, the plaintiff's symptoms abated, and she inquired of Petros as to whether she should cancel the surgery. He assured her that the surgery was necessary because her symptoms were "chronic," and she agreed to proceed.

The Darviris decision establishes that the "unfair or deceptive" act requirement of the Consumer Protection Statute may only be satisfied in medical malpractice cases by proving the "corporate greed" argument that has become commonplace in patient-care litigation.

The plaintiff attended a preoperative evaluation before the surgery at the hospital where Petros was to perform the surgery. She signed a consent form authorizing Petros to perform a fissurectomy. Darviris also consented to

additional procedures that Petros considered necessary or advisable. Darviris testified at her deposition that no one discussed a fissurectomy, a hemorrhoidectomy, or any other procedure with her at the time she signed the consent form.

On Jan. 10, 1996, the plaintiff underwent surgery. After the surgery, Petros told Darviris in the recovery room that he had performed a hemorrhoidectomy, and not a fissurectomy. Darviris became very upset, and informed Petros that she had not consented to a hemorrhoidectomy and would not have given any such consent because a family member had suffered greatly as a consequence of undergoing the same procedure. The day after the surgery, and for the following two months, Darviris experienced pain, which she attributed to the hemorrhoidectomy. On Petros' advice, she underwent a second surgery conducted by Petros on March 10, 1996, during which Petros noted that one of the hemorrhoidectomy wounds had not healed.

The plaintiff's complaint alleged multiple theories of recovery for the defendant's failure to obtain his patient's consent for a hemorrhoidectomy — simple battery, failure of informed consent, violation of MGL c. 111, §70E (the Patients' Bill of Rights), and violation of MGL c. 93A. The plaintiff relied upon 940 Code Mass. Regs. §3.16(3) to argue that, even if her surgeon was merely negligent in failing to obtain her consent to perform a hemorrhoidectomy, a 93A claim was still viable. The regulation states that an act or practice is a violation of the Consumer Protection Statute if it "fails to comply with existing statutes, rules,

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regulations or laws, meant for the protection of the public's health, safety, or welfare ..." The plaintiff argued that the patient's Bill of Rights is such a statute because it requires physicians to provide their patients with the right "to informed consent to the extent provided by law." Therefore, the plaintiff argued every violation of the statute constitutes a per se violation of the Consumer Protection Statute.

In ruling against the claim that the unauthorized surgery constituted an unfair or deceptive act in violation of 93A, the Supreme Judicial Court noted that it had "no hesitancy" in concluding that the negligent delivery of medical care, without more, does not qualify for redress under the Consumer Protection Statute. The Court reasoned that the legislature's intent in enacting a comprehensive medical malpractice statute (Mass. Gen. Laws c. 231, §60B, et seq.) was to provide an exhaustive statutory scheme to govern all medical malpractice cases, thereby limiting the growing insurance crisis in the medical profession. The

Court ruled that the legislature expressly or implicitly covered the malpractice field in such a way that precluded further remediation by the Consumer Protection Statute. The Court noted that the breadth and scope of the medical malpractice statute — requiring a screening by a tribunal, a shortened statute of limitations for minors and limits on recovery for pain suffering — demonstrated the Legislature's clear intent to "cover the field" in the arena of medical malpractice litigation. Expanding the scope of damages available to plaintiffs in medical malpractice cases as proposed by **Darviris** would permit an end-run around the clear intent of the legislature in enacting the medical malpractice statute.

The Court cautioned that not all conduct of medical providers is beyond the reach of the Consumer Protection Statute. As appellate courts in other jurisdictions have ruled, consumer protection statutes may be applied to the entrepreneurial and business aspects of providing medical services, such as unfair billing or

advertising practices. In an attempt to persuade the Court that the surgery was related to the business aspect of Petros' practice, **Darviris** argued that her doctor's failure to obtain her informed consent to perform a hemorrhoidectomy constituted a violation of 93A because the surgery may have resulted in his financial gain. The Court concluded that the evidence did not support a finding that Petros performed a hemorrhoidectomy as opposed to a fissurectomy for his own financial gain. In rejecting this argument, the Court held that a patient must demonstrate that the medical provider selected the treatment solely for his or her financial benefit in order to prove that the provider acted "unfairly or deceptively."

The Court also rejected the plaintiff's argument that the Attorney General regulations establish a per se violation of the Consumer Protection Statute by a simple finding of a violation of the Patients' Bill of Rights. The Court noted that the Attorney General's rule-making power is limited to the concepts of de-

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ception or unfairness, as guided by the Federal Trade Commission Act, 15 U.S.C. §45(a)(1) (2000). The Attorney General's power to regulate is further limited where the regulations are in conflict with existing legislation. Applying a strict liability theory to malpractice cases based upon a violation of the Patients' Bill of Rights would conflict with the remedies set forth by the Legislature in its enactment of the malpractice statute. Accordingly, the Attorney

General's regulations do not provide an independent basis for a 93A claim in the absence of an "unfair or deceptive" act arising from the commercial aspect of a provider's medical practice.

The **Darviris** holding is significant as it unambiguously limits the application of the Consumer Protection Statute in malpractice claims. The decision is a victory for traditional medical malpractice defendants as well as nursing homes and assisted-living facilities that have come under attack in recent years. The Attorney General's regulations applicable to long-term care facilities similarly state that any violation of state or federal regulations applicable to long-term care facilities "shall" constitute a violation of 93A. Given the myriad of regulations that govern every aspect of care in long-term care facilities, lawsuits most often include an allegation of a regulatory violation. In light of the potential exposure to attorneys' fees and multiplied damages, opportunistic plaintiffs have used 93A as a weapon to conduct "scorched earth" discovery in an attempt to artificially inflate potentially recoverable attorneys' fees and settlement values of cases. This tactic has been problematic especially in cases with a clear violation of an applicable regulation but nominal or limited compensatory damages. In such cases, plaintiffs have used the "strict liability" theory as a rationale to reject settlement offers that reflect a reasonable evaluation of their compensatory damages and to expand the existing litigation to "run the meter" and drive up the cost of settlements.

The **Darviris** decision establishes that the "unfair or deceptive" act requirement of the Consumer Protection Statute may only be satisfied in medical malpractice cases by proving the "corporate greed" argument that has become commonplace in patient-care litigation. While the **Darviris** holding is obviously favorable to healthcare providers, the decision may also motivate plaintiffs to pursue the "profits over people" theme with more regularity in search of 93A damages by attempting to prove staffing shortages at hospitals, nursing homes and assisted living facilities because the case makes it clear that such evidence is absolutely essential to establish a successful claim under the Consumer Protection Statute. ■

New Chairmen Chosen at CAR

BOSTON— The Governing Committee of Commonwealth Automobile Reinsurers (CAR), the state's residual market for auto insurance, has chosen new leadership.

William F. Hofmann, III, CPCU, CLU, CIC, AAI, LIA, executive vice president and treasurer of Provider Insurance Group, was unanimously voted in as the Committee chairman.

Hofmann takes over for Arthur J. Remillard, Jr., who served as the Committee's chairman for two years. CAR leadership may serve for a maximum of two years.

Hofmann is also regional chairman for InsurPac, the national political action committee arm of the Independent Insurance Agents and Brokers of America (IIBA). He did not attend the meeting.

Remillard serves as chief executive officer of Webster, Mass.-based Commerce Insurance Company, the state's largest private passenger automobile insurer. Remillard will continue to serve as a member of the Committee.

David F. Brussard, president and chief executive officer of Safety Insurance Group, was unanimously voted CAR Governing Committee vice chairman.

Brussard assumes the position formerly held by Sumner D. Gilman, president of Economy Insurance Agency.

Gilman was not reappointed to the Governing Committee by Commissioner of Insurance Julianne M. Bowler when his term expired on July 1.

Following his appointment, Brussard thanked Remillard for his "good nature and guidance" during the efforts to reform the way CAR distributes high-risk drivers among the state's insurers, a task that has occupied the Committee for several months.

Another notable reform made during Remillard's chairmanship was the development and approval of a limited servicing carrier plan for commercial automobile business. ■

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