

**HEALTHCARE COMPANY DEFEATS MULTI-MILLION DOLLAR CLASS ACTION  
COURT IMPOSES STRICT LIMITS ON CLASS ACTION PLEADING**

On November 15, 2007 Judge Peter Flynn of the Circuit Court of Cook County dismissed a comprehensive class action against Alden of Waterford, an Illinois healthcare facility. The decision is important because it makes clear what the limits are on “extortionist” claims – namely, claims with modest or non-existent damages prosecuted through the class action device to extract a settlement because of the *in terrorem* effect of the allegations and the costs of defense. Judge Flynn’s decision is a useful prism through which to view class-action claims.

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Elizabeth Frazier filed a five-count class action case arising out of her treatment during a four day stay at Alden of Waterford, a long-term care facility in Aurora, Illinois. Despite the absence of any significant injury or loss, Frazier and her law firms sought to extract significant sums from Alden by leveraging Frazier’s claims across a class of thousands of current and former residents. The case, as originally filed, detailed at length alleged staffing deficiencies and citations from the Illinois Department of Public Health in an attempt to portray the facility in the worst possible light. But Frazier did not connect these allegations to her specific circumstances. Instead, she claimed she was entitled to recover the difference between the value of care she believed she was promised and the value of the care she was actually given during her four-day stay. This contract damage theory was interposed by Frazier to avoid the growing reluctance of Illinois courts to grant class certification in personal injury cases. It has become a common strategy adopted by class action counsel.

The case was a high-risk proposition for several reasons. First, to the extent that the case was permitted to proceed to discovery, the expense would have been enormous. Just the costs of producing all documents and electronic data would have been daunting. Second, the discovery process itself would have generated additional plaintiffs and additional claims and hence additional pressure on the defendants. And third, liability to a class of thousands would have been a serious financial blow. The class claims exceeded \$100,000,000.

The Court’s decision is notable not for any dramatic new reading of the law; instead, its importance lies with what it does in the aggregate – namely, telling class plaintiffs and their counsel that strict pleading requirements will govern class actions and that such cases will not be permitted to go forward unless the complaint is firmly grounded in the principles of specific fact pleading, contains precise descriptions of loss, and articulates specific loss causation. What the Court clearly rejected is the tactic of making extreme allegations, vaguely attaching a plaintiff to the case, and attempting to extract from defendants significant sums in the face of potential class liability.

For further information, please contact:

Mr. F. Thomas Hecht  
Ungaretti & Harris LLP  
3500 Three First National Plaza  
Chicago, Illinois 60602-4224  
Tel: 312.977.4322  
Fax: 312.977.4405  
[fthecht@uhlaw.com](mailto:fthecht@uhlaw.com)



**THE COURT:** In this case, the plaintiff, Elizabeth Frazier, spent four days at a single Alden facility, that is, Alden of Waterford, which is located in Aurora. She has disclaimed from the outset any claim for personal injuries or other physical or tangible consequences based on her stay. It seems obvious that the reason Ms. Frazier has done this is in order to subordinate her individual claims, whatever they might otherwise be, to her attempts to vindicate what she perceives as the rights of others; namely, the members of what she asserts is a class.

The problem of subordinating a good individual claim, or a potentially good individual claim, to a desire to vindicate the rights of others is the same problem which led to the outcome in Avery. While it may be a laudable form of self-sacrifice viewed from a moral standpoint, from the standpoint of framing her class action, it doesn't work.

One reason it doesn't work is that it is a benchmark requirement for the maintenance of a class action that the named plaintiff have a tenable individual claim. And the way class actions are supposed to work is not that the named plaintiff reshapes her claim so that it fits a class, but rather that the situation is such that the named plaintiff's claim put forward by the named plaintiff happens to be similar to the claims of the members of the class.

It is understandable and Justice McMorrow, I think it was in Avery, acknowledged that is understandable that a class action plaintiff's counsel do try to massage a named plaintiff's claim so that it will do duty for as large a class as possible. And, conceptually, there is nothing wrong with the desire to represent as large a class as possible. The risk, however, and after Avery is not only a large risk but an explicit risk, because it's exactly what Avery worried about, is that in attempting to represent a large class, one ends up representing nothing at all, including one's own client. And it seems to me that is what has happened here.

The plaintiff's original claims had to do with not being turned often enough and not having her ice chips replenished and one or two other things, which whether they were large or small were at least tangible. One could point to them and say here's what it is.

But what we have now in the Third Amended Complaint is nothing vis-a-vis the named plaintiff to which we can really point at all. The named plaintiff asserts that the Alden defendants falsely advertise both by statements and by omissions, but she completely fails to say which of the assertively false statements she relied upon herself. And indeed as the defendants point out cites some information which appears to have been generated some years after her own stay, so that she can't very well have relied on. Even assuming that the website information, which is what I was referring to, existed at the time of her stay, moreover, there is absolutely no allegation nor permissible inference that she has a computer, used a computer, went to their website, or knows anything about what the website says. And we know from Amoco versus Oliveria, that that's the best we can do.

The difficulty here is that -- is, again, I think, that what Ms. Frazier has attempted to do is take what, from her standpoint, possibly would be a cognizable claim, not a large claim but a cognizable one, and turn it into a class action, which requires changing it out of all recognition to an accepted cause of action. And that I think she can't do.

Another failing with this complaint is that there is no cognizable allegation of harm at all that I can determine. Plaintiff doesn't say and apparently can't say that she herself actually paid for anything. Even if she could, she makes no attempt whatsoever to suggest the dollar value of an ice chip or being turned twice instead of three times. And that is a very real and, in fact, fatal problem, in my view, with regard to the causes of action she is attempting to assert.

Her real beef, I think, boils down to the fact that she didn't think she was treated particularly well during her stay. Although she asserts no -- as I said, she asserts no tangible consequences at this. It is not as though she developed bed sores and incurred medical expenses to get fixed or something like that. But I didn't like it. It was just not cognizable as a damage claim unless one has a contract which says in so many words satisfaction guaranteed. And nothing in the complaint suggests that the Alden defendants had a satisfaction guaranteed contract.

Further, her discomfort and dissatisfaction are not cognizable in a cause of action under the Consumer Fraud Act, just as they would not be cognizable in an action for common law fraud.

That is so because the Second District Appellate Court held in *Giammanco, G-i-a-m-m-a-n-c-o, v. Giammanco*, 253 Ill.App3d 750 at pages 761 and 762, that fraud is a pecuniary tort. The damage actionable in a fraud suit is damage of a pecuniary nature, the loss of money or property. Emotional distress and similar psychological concerns are not cognizable in a common law fraud action. Neither then are they cognizable in a consumer fraud action. Not just because fraud is a pecuniary tort but also because it would observe if you think about the nature of the consumer fraud action, the prospect of lawsuits seeking damages on the ground that the plaintiff didn't like something, without more, is not a particularly appealing thought.

*Giammanco* was followed in *City of Chicago versus Michigan Beach Housing Cooperative*, 297 Ill.App.3d 317 at Pages 323 and 324. *Giammanco* is a Second District case. *Michigan Beach* is a First District case. And I am, of course, bound by the Court of Appeals for the First District.

So I conclude for the reasons that I've indicated to you that the plaintiff has failed to state a cognizable Consumer Fraud Act claim because she has failed to identify with specificity the particular advertisements or omissions of the defendants of which she complains. And she has also failed to plead facts which would add up to a proximate cause connection between those representations or omissions and her four-day stay at Alden of Rockford (sic).

Even if, moreover, she were able to plead a proximate cause connection that gets her into that particular nursing facility, that is really -- but for causation it is not lost causation. The requirement in fraud cases the Consumer Fraud Act, and common law fraud being no different in this regard, is not that the plaintiff established but for causation; that is to say, I would not have entered into this transaction if you had not misrepresented something. But rather the plaintiff establish lost causation; that is to say, the particular specific loss the plaintiff claims was proximately caused by the misrepresentation.

The poster child in Illinois for that thinking, I suppose, is *Martin versus Heinold Securities*. I did not bring the cite with me, but I will get it for you entirely.

In that case, the plaintiffs went to the defendants securities firm and invested via that firm in London Commodity Options or LCO's. LCO's are enormously risky investments. They are for investors with strong stomachs and lots of money. And they didn't turn out well. It developed that the securities firm Heinold had charged the plaintiffs a fee, which was represented to be some sort of cost recoupment, but which was, in fact, a completely fictional cost. It was pure profit disguised as a fee for doing something or other.

The plaintiffs got wind of that and filed an action. The plaintiffs' allegation was if you Heinold had not lied to us about this fee, we would never have done business with you. Therefore, you owe us all for our losses on the London Commodity Options. And the Illinois Supreme Court said, well on point. The court accepted as true the plaintiffs' assertion that if they had been told the truth about the fee, they would not have done business with Heinold presumably because they could have found somebody to do it cheaper. But the court said all that gets you is the fee.

That misrepresentation had absolutely nothing to do with your buying London Commodity Options or with your loss on the London Commodity Options. You lost on those options because they were risky things, and the market turned the wrong way. And, therefore, although the plaintiffs had established but for causation or transaction causation; that is, we would never have gotten into business with you had we known, that was insufficient. In order to recover for the LCO losses, the plaintiffs had to establish loss causation which specifically tied the fraudulent representations to the specific loss alleged by the plaintiffs.

That Ms. Frazier has not done. She has not come anywhere close to doing that here. She has established -- even if we can see that she has established in a conclusory way that she would not have gone to Alden of Rockford (sic) had she known that Alden has problems with the state, that is far from establishing that anything bad happened to her while she was at Alden of Rockford (sic), which is compensable.

In that regard, the defendants accurately point out that the very same literature on which Ms. Frazier relies for the assertion of her cause of action also specifically disclaims any particular staffing levels and points out that staffing levels may fluctuate. So, I do not see how Ms. Frazier can rely on a staff level promise, which is disclaimed in the very information to which she points. And I don't think there is any evidence that she ever saw any of the literature or the disclaimer.

The end result of this is there is no cause of action, and there is no damage, no cognizable damage, and no proof of causation either. And I will get you the Heinold cite.

There is a further problem with the third Amended Complaint. And that is that it concludes a large number of defendants, at least 21 of them, with the vast majority of which plaintiff herself never had any dealings at all. That plaintiff can't do, even if otherwise she stated a cause of action.

In *Kittay, K-i-t-t-a-y, versus Allstate Insurance Company*, 78 Ill.App.3d 335, plaintiffs --three plaintiffs, named plaintiffs, brought suit against three insurance companies and twenty other insurance companies. The first three insurance companies had dealt with -- each of them had dealt with one of the named plaintiffs. The twenty other insurance companies none of the named plaintiffs had ever dealt with, but they were said to be doing the same thing as the first three. They were said to be engaging in the unauthorized practice of law in connection with using lawyers who are directly employed by the insurance companies to defendant the insureds in auto accident litigation.

And the First District Appellate Court held that while the named plaintiffs could certainly sue the companies with which they dealt, and while they might be able to represent a class of persons who had dealt with those-same companies, they could not sue nor could they represent a class with respect to any insurance companies with which they had not themselves dealt. Quote, "In the instant case, since the plaintiffs have no relationship with the twenty defendants, they do not have standing to bring this suit against them." End of quote.

That clearly applies to the vast majority of the defendants here, which is a further reason why this action, it seems to me, cannot go forward.

All of these problems have been with us for sometime. We're on the Third Amended Complaint now. And the plaintiffs counsel have strenuously and ingeniously endeavored to preserve what they hope to bring as a class action. The difficulty, underlying difficulty, however, is that they have done that at the expense of the named plaintiff's own cause of action, which is the backwards way to go about it. And since I cannot conclude that the plaintiff herself has a cognizable cause of action, for the reasons I indicated, it necessarily follows that there cannot be a class action even with respect to the Alden facility with which the plaintiff herself dealt.

It is apparent to me at this point that this isn't going to get any better. As I said we have been through now four iterations of the complaint, and the plaintiffs appear wedded to a determination to pursue a class action on a basis which almost inevitably requires them to disavow any clear cognizable cause of action of the named plaintiffs -- named plaintiff.

Given the development of the pleadings and given the apparent lack of consequences, tangible consequences, certainly pled consequences, to Ms. Frazier herself, based on her four-day stay at the Rockford facility or the Aurora facility, sorry, I am of the view that further amendment would not cure the defects I have pointed out. And I, therefore, am going to grant the defendants' motion and dismiss this case with prejudice.

A final observation that I make, just along the way, is that in Paragraph 24 the plaintiff endeavors to allege some financial consequence to herself by saying that she funded her Social Security account while working as a nurse before becoming disabled, and then says those financial contributions were made so that Medicaid could pay for the type of nursing services she needed from November 29, 2004, until December 3, 2004.

It is my understanding that Medicaid eligibility has nothing to do with whether somebody paid into Social Security or not. If she were going to make a claim on that basis, I think she would have to make it as a taxpayer. And taxpayers standing in this sort of situation has been rejected by the Illinois Supreme Court on -- in a long series of cases. So that isn't going to do to give her any kind of financial stay anyhow. Even if it were, mind you, the problem continues to be, and arguably there is a worse problem, that she hasn't alleged any specific quantifiable damage due to anything specific that the defendants did or didn't do. And without that, even if she were in a position to allege that she had paid private insurance premiums, she still wouldn't have a cause of action, it seems to me.

So, for all of those reasons, the motion to dismiss is granted, and the case is dismissed.

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**CHICAGO OFFICE**  
3500 Three First National Plaza  
70 West Madison  
Chicago, Illinois 60602  
tel: 312.977.4400  
fax: 312.977.4405

**SPRINGFIELD OFFICE**  
400 E. Jefferson Street  
Suite 1200  
Springfield, Illinois 62701  
tel: 217.544.7000  
fax: 217.544.7950