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Ejected guests can bring 93A claim against hotel chain

Unwritten policy barred doing business in rooms

■ ERIC T. BERKMAN

The Appeals Court has ruled that a Chapter 93A suit can proceed against the Marriott hotel chain after one of its franchisees ejected hotel guests for violating an unwritten policy against doing business at the property.

Plaintiffs Louise Connor, Stephanie Fishman and their company, NY Kids Showroom, rented suites at Marriott's Fairfield Inn in Dedham in order to display sample merchandise to prospective clients, retailers of children's clothing — something they had done in the past.

The plaintiffs apparently called ahead to discuss the handling of large boxes of samples that they shipped to the hotel in advance, and the front desk confirmed the booking and the hotel's receipt of the samples.

But after they checked in, the manager told them they could not do business at the hotel pursuant to a "no solicitation" policy that he allegedly refused to show them. He then directed them to leave the property and subsequently called the police to remove them.

According to the plaintiffs, the hotel's acts amounted to unfair trade practices in violation of Chapter 93A.

A Superior Court judge granted summary judgment to Marriott and the franchisee, defendant Giri Dedham, LLC, but the Appeals Court reversed.

"Knowing the business purpose of the plaintiffs' stay, the hotel's failure to tell them in advance that they could not do business there was unlike neglecting to warn that an elliptical machine in the hotel gym was out of order, and more akin to neglecting to tell arriving guests that rooms are not furnished with beds," Judge Gregory I. Massing wrote for the panel. "While the defendants will have an opportunity to explain their conduct to the trier of fact, the plaintiffs are entitled to an opportunity to persuade the fact finder that this sequence of events, as described by the plaintiffs, was unfair and caused substantial injury to their business."

Connor, et al. v. Marriott International, Inc., et al.

THE ISSUE: Could a Chapter 93A claim proceed against a hotel chain after one of its franchisees ejected hotel guests for violating an unwritten policy against doing business on the premises?

DECISION: Yes (Appeals Court)

LAWYERS: Olena Savytska of Lichten & Liss-Riordan, Boston (plaintiffs)

Sally A. Morris of Portland, Maine (defense)

The 17-page decision is *Connor, et al. v. Marriott International, Inc., et al.*, Lawyers Weekly No. 11-021-24.

'SIGNIFICANT STRIDE'

Plaintiffs' counsel Olena Savytska of Boston said the ruling not only marked "a significant stride in developing the caselaw around Chapter 93A" but was a victory for her clients and "the thousands

of hotel visitors in Massachusetts, particularly those who, like the plaintiffs, come here on business."

Defense counsel Sally A. Morris of Portland, Maine, could not be reached for comment prior to deadline.

But Boston attorney Joshua M. Bowman, who represents hotel operators, called *Connor* a case of "bad facts make bad law."

According to Bowman, it is common for operators of limited-service business hotels like Fairfield Inn — which are designed for business travelers to arrive, sleep in their room, have breakfast, and leave to conduct business elsewhere — to have an interest in restricting what guests can do on the premises.

The problem here, Bowman said, was that the employee apparently took the reservation, allowed the group to ship their goods to the hotel, and actually received and stored the goods before allegedly telling the plaintiffs on arrival that they could not do business at the hotel, and that if they did not leave, they would be arrested.

"In my opinion, this wasn't good business practice and that's when you have litigation," Bowman said. "This whole thing could have been avoided if they had just realized they needed to post their policy, and that if this group was coming and wasn't in compliance, they should just let them conduct their business one last time and, going forward, not take reservations from anyone who was going to be doing business out of their rooms."

Still, Bowman was skeptical that the case rose to the level of a Chapter 93A violation.

"You have to consider this in a business context," he said. "This wasn't a grandma traveling with her grandchildren. The guests were a commercial enterprise, and not being allowed to display children's clothing out of a room at a Fairfield Inn doesn't sound like a Chapter 93A case to me. The court just said that when taking the facts most favorable to the moving party, there's a triable issue. I'd be shocked if the court actually found this was a 93A case."


Michael Gilleran

Boston attorney Michael C. Gilleran, who has litigated and written about Chapter 93A for decades, said the case suggests that a material omission can now create liability in the Chapter 93A, Section 11, business context and not just the Section 9 consumer context.

"This is a big deal," he said. "The issue has been open for years and has never been squarely decided at the appellate level until now. This makes a business claim under Section 11 more powerful than ever, far more powerful than any common-law fraud or misrepresentation claim, which cannot generally be based on any omission or nondisclosure."

He also predicted the case would become a hallmark for analysis of 93A claims on summary judgment going forward.

Robert W. Stetson of Boston said the decision raises a lot of questions.

"We know from the [Supreme Judicial Court's 2022 *H1 Lincoln v. South Washington Street, LLC*] case that an intentional breach of contract is insufficient to trigger Chapter 93A," Stetson said. "What about an intentional breach coupled with a poor excuse?"

While *Connor* may hinge on the hotel's ham-handed response to the situation, Stetson said, in many instances of "manufactured" defenses, parties will be represented by counsel.

"Parties and their lawyers 'manufacture' reasons for bad conduct with some regularity," he said. "It will be interesting to see how far courts will allow parties to claim unfairness against more deliberated or coordinated responses."


John A. Magones

Boston attorney John A. Mangones said the most important point the decision raises is that enforcement of a legally valid policy can become an unfair or deceptive act if a consumer is led to believe that such a policy does not exist or would not apply to them.

"This rule could be applied to a broad array of business settings beyond the hospitality context," Mangones said.

UNWRITTEN POLICY?

For several years leading up to the events of the case, the plaintiffs rented rooms at Fairfield Inn to showcase their wares to Boston area retailers.

They always requested specific suites for space to wheel in large displays and bring in boxes of merchandise. The plaintiffs would take appointments or meet with walk-in visitors, who would give orders for items to be produced and shipped later.

On Sept. 14, 2019, plaintiff Fishman drove to Dedham from New Jersey, calling the hotel ahead of time to discuss the handling of five large boxes that had been shipped to the hotel in advance.

The employee she spoke with apparently confirmed the booking and the hotel's receipt of the boxes, welcomed Fishman as a repeat guest, and remembered her preference for a larger suite.

Connor arrived before Fishman, and the hotel's manager, Matthew Cooke, checked her in. Soon afterward, Cooke allegedly visited her room to inform her she "couldn't do any business there."

Connor explained that she had visited for business many times before and had never directly sold merchandise from the room.

After phoning the general manager, Cooke allegedly directed Connor to leave the premises because the policy had changed. He also told her she was on a "do-not-rent" list because she and Fishman "no longer fit the image of the hotel."

The general manager, who cited safety risks of allowing unregistered visitors into the hotel to view their products, apparently also directed Cooke to call the police to remove Connor.

By the time Fishman arrived, Connor had been speaking with police in the parking lot for about 15 minutes, trying to resolve the conflict.

The plaintiffs demanded to see a written copy of the new policy or the do-not-rent list, but Cooke allegedly refused.

The confrontation allegedly lasted for hours, and the police briefly and reluctantly handcuffed Connor before the plaintiffs agreed to leave.

The plaintiffs filed a 93A suit in Superior Court.

Judge Paul D. Wilson granted the defendants' motion for summary judgment, and the plaintiffs appealed.

PLAUSIBLE CLAIM

In reversing the lower court ruling, the Appeals Court pointed to two aspects of the defendants' conduct that, if proven, would be unfair within the meaning of Chapter 93A.

"One is that the hotel allowed the plaintiffs to make travel plans, ship merchandise, and arrange to meet with clients, all the time knowing that the hotel would upend the plaintiffs' plans and disrupt their business as soon as they arrived. This sort of 'stringing along' conduct has been held to be actionable under c. 93A," Massing wrote. "The other is that when the hotel sought to oust the plaintiffs, it purported to justify its actions based on what the trier of fact could find to be a policy that did not exist, obscuring whatever true motives the hotel may have had."

Additionally, the panel found, the defendants' conduct could be deemed deceptive.

"The hotel's misrepresentation of assent to the plaintiffs' business trip could be found to be an affirmative act that misled the plaintiffs into making a reservation and traveling to the defendants' hotel, rather than someplace else, which they would not otherwise have done, Massing wrote. "At the very least, the plaintiffs have presented a triable issue of fact whether the hotel's use of an arguably fictitious policy and do not rent list was a deceptive means of forcing them out of the hotel."