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Trial Notebook

Hotel tagged for allegedly labeling business cost as tax charge

By Steven P. Garmisa
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An increasingly common tactic by retailers is to advertise a product or service at a particular price and then tack on extra fees and charges. One particularly deceptive variation of this maneuver is to label extra fees in a way that makes them appear to be taxes or other government-imposed charges.

A good example of this creative writing in retailing is found in the allegations of a class action filed against Oakbrook Hilton Suites. *Terrill v. Oakbrook Hilton Suites and Garden Inn LLC*, 2003 Ill.App. LEXIS 486 (April 21).

Oakbrook Hilton was accused of adding a fee for what the average consumer would consider ordinary overhead — security fees voluntarily paid to a municipality for extra police surveillance — and then disguising the fee under a line entry for hotel taxes.

Cathy Terrill, the named plaintiff in a class action, checked into the Oakbrook Hilton. The nightly room rate was $99. When she checked out the next morning, she received a bill listing additional charges, including expected entries for phone calls and room service. The bill also included a line item entitled "Room Occupancy Taxes" of $8.91.

Of the amount collected by the hotel for taxes, 6 percent of the room rate was forwarded to the state, and 1 percent was forwarded to the City of Oakbrook Terrace for taxes. But the hotel also forwarded 2 percent of the room rate to Oakbrook Terrace, according to the Appellate Court, "in exchange for daily police surveillance of the hotel."

The hotel moved to dismiss the complaint, arguing that Terrill's claim was barred by section 3(f) of the Illinois Hotel Operator's Occupation Tax Act.

DuPage County Circuit Judge Patrick J. Leston denied the hotel's motion but certified this question for interlocutory appeal: "Does 35 ILCS 145/3(f) bar a direct action by a consumer against a retailer when the retailer has collected a security fee under the guise of a hotel tax and remitted the security fee to Oakbrook Terrace for payment of security services, a non-tax obligation, and where the consumer did not request a refund prior to the time the payment was remitted to the hotel and to Oakbrook Terrace?"

Section 3(f) reads: "If any hotel operator collects an amount (however designated) which purports to reimburse such operator for hotel operators' occupation tax liability measured by receipts which are not subject to hotel operators' occupation tax, or if any hotel operator, in collecting an amount (however designated) which purports to reimburse such operator for hotel operators' occupation tax liability measured by receipts which are subject to tax under this act, collects more from the customer than the operators' hotel operators' occupation tax liability in the transaction, the customer shall have a legal right to claim a refund of such amount from such operator. However, if such amount is not refunded to the customer for any reason, the hotel operator is liable to pay such amount

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No product claim in surgical implant: justices

By JOHN FLYNN ROONEY
Law Bulletin staff writer

A patient cannot pursue a product liability claim against a downstate hospital at which an allegedly defective medical device was surgically implanted in her, the Illinois Supreme Court ruled Thursday.

The case was followed closely by the Illinois Trial Lawyers Association and the Illinois Hospital Association, which filed amicus curiae briefs taking opposing stances in the case.

The central issue in the appeal was whether a hospital that "sold" a device intended to treat incontinence could be sued under the implied warranty provision of the Uniform Commercial Code.

The justices upheld a 4th District Appellate Court ruling in favor of the Sarah Bush Lincoln Health Center in the lawsuit brought on behalf of Brenda Brandt.

"Because we find that the transaction between Brandt and the health center was predominantly a transaction for services, article 2 of the UCC does not apply," Justice Rita B. Garman wrote in Thursday's decision.

There were no written dissents.

The high court's decision "is a very big victory for hospitals in Illinois," said Timothy G. Shelton, a lawyer with Hinshaw & Culbertson in Chicago, representing the health center on appeal.

Brandt claimed injuries, including infection, bleeding and erosion of vaginal tissue, after a doctor inserted a pubovaginal sling as part of a bladder suspension procedure to treat incontinence in December 1998.

The manufacturer of the sling, Boston Scientific Corp., issued a voluntary recall of the product the following month. Within a year of the surgery, Brandt experienced several medical problems and had the sling removed, according to her attorneys.

She then sued the hospital and the manufacturer - but not her doctor - for breach of the implied warranty of merchantability under Illinois' UCC.

A Coles County trial court dismissed Brandt's claim against the hospital, and a 4th District panel affirmed in a 2-1 ruling, though on different grounds.

The high court accepted Brandt's appeal in October.

In an amicus brief filed in November, ITLA contended that the high court had already decided the issue in its 1970 ruling in *Cunningham v. MacNeal Memorial Hospital*, 47 Ill.2d 443.

The court's decision in *Cunningham* cleared the way for product liability suits over tainted blood. But the legislature quickly exempted blood products from those suits in response to the ruling.

The IHA filed its brief in January, asserting that hospitals provide services, not goods. The association further contended that as service providers, hospitals don't fall under the UCC's section governing implied warranties.

The health center argued that it shouldn't be open to the product liability claim because it provided a service rather than a product.

Article 2 of the UCC applies to "transactions in goods."

"Where there is a mixed contract for goods and services, there is a 'transaction in goods' only if the contract is

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U.S. justices report jaunts, net worth

By GINA HOLLAND
Associated Press writer

WASHINGTON — The Supreme Court justices traveled widely in 2002, teaching or speaking in Israel, Croatia, China, Denmark and elsewhere, reports released Wednesday show.

Some of the trips were closer to home, such as Justice Sandra Day O'Connor's two-day stop in Forth Worth, Texas, last summer to join the National Cowgirl Hall of Fame.

O'Connor reported the most trips last year. The 73-year-old was reimbursed for 16 visits, including speaking engagements in Canada, China, England, Ireland and Russia. She also managed to fit in a trip to California for her Stanford Law School reunion, her report shows.

Justices each year must report their assets, not including their homes, along with gifts, earnings and some details of reimbursements they receive for travel.

She plans to beat the drum on subject of rainmaking

By BILL MYERS
Law Bulletin staff writer

It's been 130 years since Alta May Hulett had to draft the nation's first equal rights law so she could take her place as Illinois' first female attorney.

Today's women lawyers need to focus their labors on a different sphere, says the new president of the Women's Bar Association of Illinois.

"What I think is important is networking to make business more of a focus — learning how to be a rainmaker," Elizabeth M. Budzinski said in a recent interview.

Budzinski, who takes over as president of the 89-year-old bar association during an installation dinner Thursday, says she wants to focus her energies on helping women lawyers drum up business.

"My theme is professional power: How do I utilize my skills to obtain business? That's something the Women's Bar Association needs to focus on," said Budzinski, a recently chosen Cook County associate judge currently sitting in Traffic Court.

The fact that so many barriers have come down for women attorneys is all the more reason for women to pull themselves up to the top of their profession, Budzinski said.

That's a big departure for Budzinski, who was a litigator in private practice — most recently at Wilson, Elser, Moskowitz, Edelman & Dicker LLP — and who

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to the department." The 2d District Appellate Court agreed to take the appeal.

Hilton argued that the class action should be dismissed because the hotel forwarded all the money it collected as taxes to the state and city. As Justice Robert E. Byrne explained (with some omissions):

"Defendant asserts that if the customer fails to obtain a refund 'for any reason,' the hotel is obligated to pay the entire tax collected to the Department of Revenue. Defendant asserts that the Supreme Court in *Adams v. Jewel Cos.*, 63 Ill.2d 336 (1976), specifically held that once the retailer remits the overtax to the department, the overtaxed customer cannot sue the retailer directly.

"Because defendant remitted the overcharge to Oakbrook Terrace, which defendant asserts is synonymous with the department, defendant contends that the statute applies to bar plaintiff's claim against defendant."

Rejecting the hotel's arguments, Byrne and his colleagues concluded:

"We agree with plaintiff that section 3(f) covers circumstances involving tax overcharges, as a portion of the statute clearly allows reimbursement where the hotel, in collecting an amount 'which purports to reimburse' the hotel for its 'operators' occupation tax liability measured by receipts which are subject to tax under this act, collects more from the customer' than the amount of the tax liability transaction. 35 ILCS 145/3(f). However, it is equally clear that another portion of section 3(f) also encompasses situations involving non-taxable charges as well.

"Here, defendant charged and collected from plaintiff a security fee under the guise of a hotel tax. To paraphrase the statute, once defendant included the non-taxable security fee charge within the same line as the charge designated 'Room Occupancy Taxes,' defendant collected an amount that purported to reimburse defendant for its operators' occupation tax liability measured by receipts that were not subject to defendant's occupation tax. See 35 ILCS 145/3(f).

"While we find that the statute encompasses non-taxable charges as well as tax overcharges, defendant's interpretation of the meaning of 'department' and its subsequent conclusion that the statute therefore bars plaintiff's suit against it is untenable at best.

"Defendant asserts that Oakbrook Terrace is a municipal government with the power to collect local taxes. Defendant contends that it complied with the statute because it paid plaintiff's 'overtax funds' to Oakbrook Terrace and, therefore, the statute and *Adams* apply to bar plaintiff's claims.

"Defendant, however, ignores that the statute expressly states that 'if such amount is not refunded to the customer for any reason, the hotel is liable to pay the overcharge to the department.' The act defines 'department' as the 'Department of Revenue.' 35 ILCS 145/2(7). Oakbrook Terrace is not the Department of Revenue.

"We note that when a hotel operator incorrectly designates a service fee under the guise of a hotel operators' tax, if such amount is not refunded to the customer, the hotel operator is responsible for remitting this to the Department of Revenue. See 35 ILCS 145/3(f). By rendering the hotel operator liable for the disputed amount if the occupant does not collect the refund, the legislature removes the hotel's incentive to overcharge, thereby ensuring the underlying legislative policy against unjust enrichment.

"In this case, plaintiff alleges that defendant used her money to pay a non-tax liability and charged her more than she contractually agreed upon. Under the plain meaning of the statute, because defendant never remitted the non-taxable charge to the department, plaintiff has a legal right to claim a refund. As such, defendant cannot rely on section 3(f) of the act to bar plaintiff from suing defendant."

Summing up, Byrne concluded:

"It is clear, given the facts of this case, that defendant misapprehends the concept of accountability. Because defendant remitted the 2 percent service fee to Oakbrook Terrace instead of the department, defendant cannot use the act or case law to shield itself from direct liability. Unjust enrichment principles are based on the idea that no one ought to enrich himself unjustly at the expense of another.

"This basic concept was illustrated in *Harrison Sheet Steel Co. v. Lyons*, 15 Ill.2d 532 (1959), in which the court cited the following example: 'A purchases goods from B, it being agreed that B is to pay a supposed sales tax thereon with money supplied by A. A pays B $1,000, in addition to the purchase price, to pay the tax. No tax is due. A is entitled to restitution.' *Harrison*, 15 Ill. 2d at 536-37, quoting Restatement of Restitution, section 48, illustration 3, at 197 (1937).

"Here, accepting plaintiff's allegations as true, as is required when deciding a section 2-619 motion to dismiss, we conclude that defendant has unjustly enriched itself by using the monies it collected from the tax line item in the customer bill to pay for ordinary vendor services.

"The end result is that defendant is inflating the tax line item and using purported tax revenues to pay off a normal non-tax contractual obligation and charging its customers more than the contractually agreed-upon room charge to pay off a normal, non-tax operating expense. Thus, defendant, at the very least, is unjustly enriching itself at the expense of plaintiff and others similarly situated. Under these circumstances, section 3(f) does not bar plaintiff's claims, either under the express language of the statute or under the case law interpreting its effect."

Assuming the allegations in Terrill's complaint are true, the remaining question is whether this is a widespread practice in the hotel industry.

Are other hotels charging — as taxes — fees they voluntarily pay to municipalities for "extra police surveillance"?

If so, savvy consumers might have valid class actions.

Case Summ

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action locally, and Cook County residents should not be encumbered with the trial expense of plaintiff's unconnected claim," the appeals court said.

In addition, the court said, the plaintiff's original decision to file in Will County, his voluntary dismissal on the "brink of trial," and the subsequent filing of a nearly identical claim in Cook County strongly infers that the plaintiff was engaging in forum shopping — a "driving concern" of the Supreme Court's forum non conveniens jurisprudence.

The court also said there was an "appreciable" difference in court congestion between Cook County and Will County.

Timothy D. Czarnecki v. Uno-Ven Co., etc., et al., No. 1-02-0020. Justice Denise O'Malley wrote the court's opinion with Justices Joseph Gordon and Jill K. McNulty concurring. Released May 27, 2003.

Family law — attorney fees

Trial court did not have authority in Parentage Act proceeding to order disgorgement of interim attorney fees received by one attorney for payment to opposing counsel.

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The Illinois Appellate Court, 1st District, 3d Division, has reversed a ruling by Judge Kathleen G. Kennedy.

Petitioner Patrick Stella filed a petition under the Parentage Act on Jan. 29, 1998, to establish a parent-child relationship with his daughter, Alexis. The petitioner initially was represented by attor-