The Metropolitan
Corporate Counsel®

www.metrocorpcounsel.com

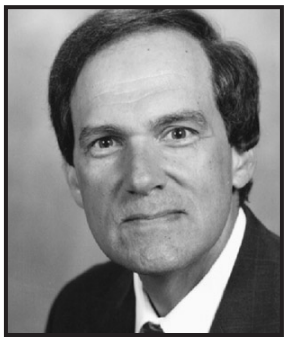
Volume 13, No. 5 May 2005

District Court Recognizes That Class Actions Against Not-For-Profit Hospitals Cannot Solve The Problem Of Funding Affordable Health Care For Uninsured Patients

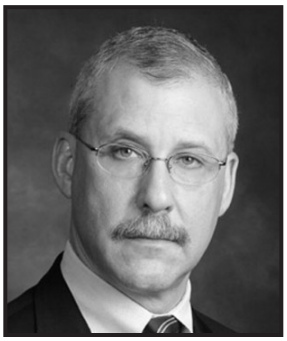
James S. Frank
Jeffrey J. Greenbaum
and James M. Hirschhorn

SILLS CUMMIS EPSTEIN & GROSS P.C.

James S. Frank



Jeffrey J. Greenbaum



James M. Hirschhorn

Affordable health care for all Americans has been a significant issue in national politics for at least the past 15 years. Those most in need of it are the people who fall outside the boundaries of the current system of health care finance, namely those above the threshold for government-assisted health care but unable to obtain affordable health insurance coverage privately or through their employer. How to assure affordable health care for all Americans is one of the most serious and intractable issues in our public life. Charity, including free or reduced price care provided by not-for-profit hospitals to the indigent, is only part of the solution. A fuller solution lies in identifying sources to fund the purchase of health insurance, and that can only be done through the political process.

On March 29, 2005 the U.S. District Court for the Southern District of New York dismissed with prejudice all of plaintiffs' claims in *Kolari v. New York-Presbyterian Hospital*, 04-Civ. 5506. The suit had claimed that the New York-Presbyterian Hospital, as a tax-exempt charitable institution, was required by federal and New York law to provide hospital care to uninsured patients at rates no higher than those it had negotiated with health insurance carriers or paid by government programs. The District Court held that none of the plaintiffs' claims had any basis in federal or New York law. In reaching its decision, the District Court perceptively criticized the suit as a misguided attempt to address, through litigation, complex issues of public policy that should instead be addressed through the political process.

Kolari and its two companion cases, *Barbour v. New York-Presbyterian Hospital* and *Eroglu v. New York-Presbyterian Hospital*, were part of a campaign of more than 40 putative class action suits against not-for-profit hospitals around the country, coordinated by plaintiffs' lawyers who had been active in tort litigation against the tobacco industry. The theme of this campaign, asserted by plaintiffs' counsel in stridently populist language, was that not-for-profit hospitals should be forced to subsidize, at their own expense, health care for all uninsured patients, regardless of means, by charging such patients no more than they could afford to pay, and in any event no more than the rates the hospitals had negotiated with health insurance carriers. To support plaintiffs' policy arguments,

*The New York-Presbyterian Hospital was represented by **James S. Frank**, **Jeffrey J. Greenbaum** and **James M. Hirschhorn** of Sills Cummis Epstein & Gross P.C. Mr. Greenbaum, who argued the motion to dismiss, is former Co-Chair of the Class Actions and Derivative Suits Committee of the American Bar Association Section on Litigation and a member of the ABA President's Task Force on class action reform.*

Please email the authors at jfrank@sillscummis.com, jgreenbaum@sillscummis.com or jhirschhorn@sillscummis.com with questions about this article.

the complaints in the *Kolari* actions contained extensive allegations about the lack of health insurance coverage affordable by New York residents. These general allegations the District Court characterized as "statistics of the kind normally associated with legislative hearings," and as "arguments that should be addressed to the political branches – perhaps in this case the New York Legislature – not the judicial branch."

Turning to the legal aspects of plaintiffs' claims, the District Court dismissed their primary claim under federal law, which was that the Hospital's tax exemption under the Internal Revenue Code, §501(c)(3) as a charitable institution created either a third-party beneficiary contract or a charitable trust requiring the Hospital to provide free or reduced charge care to uninsured patients. Not only did plaintiffs lack standing to enforce the Internal Revenue Code, it held, but their claim lacked any legal merit. Eligibility for a federal tax exemption does not create either a contract with the federal government or a charitable trust. Moreover, nothing in §501(c)(3), as interpreted by the Internal Revenue Service, created any right to receive free or reduced charge care.

The District Court also dismissed plaintiffs other federal claims that the Hospital's charges violated the Emergency Medical Treatment and Active Labor Act, 42 U.S.C. § 1395dd, and that the Hospital's efforts to collect the unpaid bills of the uninsured plaintiffs violated the Fair Debt Collection Act, 15 U.S.C. § 1692. Plaintiffs withdrew at oral argument their claim that the Hospital's charges violated their constitutional rights.

With respect to New York law, the District Court held that the Hospital's tax exemption under state law did not require it to provide free or reduced charge care to uninsured patients. It also dismissed plaintiffs' claims under New York law that the Hospital had breached a contract, received unjust enrichment, committed fraud or violated the New York consumer fraud statute by charging higher rates to uninsured patients than to insurers. On the contrary, the Court pointed out, "it is undisputed under New York law that a hospital's charges to an uninsured patient are not unreasonable merely because a lower price is charged to government programs or other insurers." The negotiation of lower rates by insurers to their insured, said the Court, "is an economically efficient outcome for both sides [insurer and hospital] that is fully sanctioned by New York law."

"Plaintiffs' many arguments," concluded the District Court, "rest upon the premise that a charitable hospital is compelled by law to provide free service to all who cannot, or claim they cannot, afford to pay for those services. However, no federal or state statute, and no principle of the common law requires a private not-for-profit hospital to charge uninsured patients the same, or less, than the rates it charges to members of health insurance plans or the rates such a hospital accepts from Medicare and Medicaid."

Every case which has reached a decision on the merits has dismissed with prejudice the federal claims raised in *Kolari*. Unlike prior decisions of the federal courts, however, *Kolari* reached the merits of the state law claims and dismissed them with prejudice as well, instead of dismissing without prejudice so that they might be re-filed in state court. In doing so, the District Court recognized that the problem of funding health care for the uninsured is far more complex than plaintiffs' lawyers would have it, and that class-action suits against isolated not-for-profit hospitals accused of having deep pockets are too blunt and too limited an instrument to solve it.

Kolari and the suits like it ignore the great efforts already made by the New York-Presbyterian Hospital and other not-for-profit hospitals to provide indigent uninsured patients with free or reduced charge care. They ignore the economic pressure exerted on hospitals by health insurers. They ignore the laws which encourage insurers to exert that pressure on behalf of their own policyholders without regard to the impact on the uninsured. They ignore the stringent limits on government subsidized care for the indigent, and they ignore the public's reluctance to be taxed to provide more generous care to a broader range of people in need. They ignore the rising cost of increasingly sophisticated care, and they ignore the need to pay fair compensation to the many skilled and devoted people who deliver that care. Instead, plaintiffs' counsel would demonize a great institution with limited resources serving the public and attempt to stir up a jury's indignation against it.

The case demonstrates that class action lawsuits are ill-suited to solve a broad social problem that has not been caused by the targeted defendants. Making adequate health care available to all Americans who need but cannot afford it is fundamentally a societal problem which can only be addressed by transferring resources into the health care system rather than further squeezing the existing providers of health care. As such, it is a political problem, not a judicial one, because only legislatures have the comprehensive power over all the interested parties, including providers, insurers, patients and the tax-paying public. Singling out one group on tactical grounds, and then using the threat of class action liability to coerce them into bearing the entire burden, is neither fair nor sensible.

The District Court saw through the legally insufficient theories advanced by plaintiffs' counsel to the fundamentally legislative goals beyond. As it recognized, "Plaintiffs here have lost their way; they need to consult a map, or a compass, or a Constitution because they have come to the judicial branch for relief that may only be granted by the legislative branch." We hope that *Kolari* and similar decisions in the not-for-profit hospital litigation around the country will remind the courts of the appropriate limits of the class action as an instrument of social reform.