

Complaint for Unfair and Deceptive Infertility Program Practices

13.1 Complaint

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

[plaintiff]ANDREA and STEPHEN R. KING, individually and on behalf of all others similarly situated,

Plaintiffs,

[vs.]

[defendants]IVF AMERICA, INC., IVF AMERICA (NY), INC., UNITED HOSPITAL, DR. JOHN J. SMITH, VICKI L. BORDEN and DOES 1-10, intended to be others legally responsible for the acts alleged herein, whose names are presently unknown,

Defendants.

AMENDED VERIFIED CLASS ACTION COMPLAINT

PLAINTIFFS, by their attorneys, [Attorney for Plaintiff], as and for their Amended Complaint as of right and pursuant to stipulation, respectfully allege, upon information and belief, except for paragraphs "5", and "26" below, which are alleged upon personal knowledge, the following:

NATURE OF ACTION

1. This is a class action asserting that defendants have engaged in a deceptive, fraudulent, misleading and flagrantly illegal course of conduct over a long period of years in connection with their dissemination of false, exaggerated and unsubstantiated laudatory misrepresentations as to their success rates in treating infertility problems and concealment and misrepresentation of significant health risks, high miscarriage rates, failure rates approaching 90%, excessive neonatal deaths and physical disability problems of infants born as a result of treatment by defendants, as well as the use of dangerous drugs in the treatment Program.

2. Such course of conduct was followed by defendants for the purpose of luring couples who were desperately seeking to have children, but have been unsuccessful for various reasons, to pursue costly medical treatment with defendants to solve their infertility problems, and to repeat such medical treatment after failures of earlier treatments, although the great preponderance of women who are treated do not have children as a result of such treatment.

3. The above course of conduct of defendants was the subject of proceedings by the Federal Trade Commission which resulted in a cease and desist order, dated December 31, 1990, annexed as Exhibit A [*not reprinted herein*], against the corporate defendants, their officers, agents, employees or related entities, enjoining them from advertising, promoting or offering for sale their infertility treatment program by the use of erroneous success statistics and directing that any percentage success rates be based upon appropriate methods of calculation and in a manner which could be easily understood by persons seeking treatment from defendants.

4. A similar proceedings by the New York City Department of Consumer Affairs resulted in an Assurance of Discontinuance, dated April 27, 1993, annexed as Exhibit B [*not reprinted*

herein], which likewise prohibited all oral or written representations by the Long Island branch of defendants, in exaggerating success rates and not presenting information in a manner easily understood by lay people and to desist from making claims of "cumulative success rates" based on repeated attempts of using the treatment procedures of defendants, unless such "cumulative success rates" were presented in the manner required by the Assurance of Discontinuance. It was also agreed that no unqualified claims would be made as to the risk of taking the drugs and hormones necessary in the treatment program as to either the mother or child born as a result of such procedures.

PARTIES

5. Plaintiffs are residents of the County of Nassau, State of New York.

6. Defendant IVF America, Inc., formerly known as IVF Australia, Ltd., is a foreign corporation, with its principal place of business in Greenwich, Connecticut.

7. Defendant IVF America (NY), Inc., formerly known as IVF Australia (NY), Inc., is a foreign corporation with its principal place of business in the County of Westchester, State of New York.

8. Defendant United Hospital is a not-for-profit corporation organized under the laws of the State of New York, located in the County of Westchester, State of New York.

9. Defendant, Dr. John J. Smith was the Medical Director for the IVF America Program at United Hospital and a provider of medical counsel and treatment in connection with the infertility program of the corporate defendants.

10. Defendant, Vicki L. BORDEN was a founder of the IVF America companies and is a Director and Senior Vice President of Operations.

11. Defendants, DOES 1 through 10, are those other persons connected with the infertility program of defendants who are responsible for the illegal acts alleged herein, but whose names are not presently known. At the appropriate juncture, plaintiffs shall move to amend this Complaint to add such defendants.

WRONGFUL CONDUCT ALLEGED

12. In 1986, defendant IVF America companies commenced their In vitro Fertilization program ("IVF") to evaluate and treat infertility problems.

13. Defendants, their officers, employees, agents and medical staff held themselves out to the public as possessing the necessary expertise, skill and knowledge to render appropriate medical advice, diagnosis and treatment to deal with infertility problems and in a manner conducive to the successful accomplishment of a pregnancy and the resultant birth of a take-home baby.

14. The usual IVF procedure has four basic steps which are followed, in what is known as an "IVF Cycle", namely: (i) ovarian "egg stimulation", i.e., the administration of drugs to stimulate egg production of the female patient, (ii) the egg(s) produced, if any, are "retrieved", i.e., removed from the ovaries of the female patient, (iii) the "retrieved" egg(s) are then fertilized with sperm from the husband, or a donor if necessary, to fertilize in the laboratory and grow into an embryo(s), and (iv) the transfer of the embryo(s) to the uterus of the woman patient.

15. If each of the foregoing steps is successful, it may result in a clinical pregnancy. Such pregnancy may then hopefully lead to a live birth, the obvious goal of the IVF program.

16. The success rate of the IVF program is affected by the satisfactory conclusion of each of the four basic medical procedures described above and the problems associated with maintaining a pregnancy, if any, until the birth of a live child.

17. The success rate is also dependent upon an individualized medical evaluation of each couple in the program so that specific factors related to the age of patients and the medical conditions causing the infertility can be assessed.

18. The Society of Assisted Reproductive Technologies ("SART"), the recognized medical society monitoring IVF programs, for example, collects data from fertility clinics which include subsets for age groups and for various medical conditions contributing to infertility, such as defective ovulation, blocked or absent fallopian tubes, endometriosis, abnormal antibody production and/or low or poor sperm quality. For some couples there is no identifiable cause and this is medically known as idiopathic infertility.

19. Despite the varying success and failure rates for each of the four basic IVF procedures described above, and with respect to the relevant age and medical problems presented, defendants disseminate, via oral, visual and written material, exaggerated success rates, excluding certain subsets of failed treatment procedures, emphasizing numerically false and misleading overall success rates and conceal and misrepresent significant health risks, high miscarriage rates and excessive neonatal deaths and abnormalities of infants even if a birth resulted from the treatment rendered by defendants.

20. Examples of such grossly exaggerated success rates and misinformation disseminated by defendants include promotional materials, advertisements, slide presentations, oral representations and concealment of material facts, and so-called "educational" seminars, including the following:

- A. "LIKELY TREATMENT OUTCOMES . . . Our experience indicates that when a patient at an IVF Australia Program completes four IVF treatment cycles, the chance of giving birth is about 50%. . . . [Presented in diagram which follows] if 25 women begin a total of 100 IVF cycles . . . About 13 (or about 50%) of the women give birth to 18 babies" (emphasis in original)
- B. "[M]ore than 28% of the couples who complete a cycle of treatment are becoming pregnant"
- C. "[O]ne out of three couples who complete a cycle of treatment is becoming pregnant"
- D. Slide presentations at so-called seminars misrepresent and conceal dangerous health problems, with verbatim statements that read as follows:
"No increase in health risks. No increase in health risks to patients. No increase in miscarriage rate. No increase in birth defects."
- E. Representing that after eight cycles a couple's chance of getting pregnant was 80%, thereby promoting the continued use of failed medical procedures.
- F. The drugs and hormones utilized in the course of medical treatment presented no danger to mother or child.
- G. Falsely representing to female patients that they were "perfect" or "ideal" candidates for a successful IVF treatment program leading to the birth of a take-home baby.

21. In truth and in fact each of the representations set forth above is false and untrue and has a capacity, tendency or effect of deceiving and misleading members of the public, including physicians who refer patients to the IVF America programs.

22. Defendants further conceal from potential patients and those entering the program the significant cancer risks from the drugs and hormones utilized, the excessive miscarriage rate arising from the nature of the treatment, as well as the abnormally high neonatal death and physical disability rates of babies born as a result of the IVF procedure of defendants.

23. Defendants are medical professionals who occupy a fiduciary obligation to prospective patients and those who enter the IVF program. The expertise and judgment of defendants is necessarily relied upon in deciding whether to undergo infertility diagnosis and treatment by the IVF America program.

24. A further example of the wrongful conduct of defendant relates to the statutory "informed consents" required by Public Health Law §2805-d(1). Such "informed consents" must provide reasonable and understandable explanations of the success rates, risks and alternatives to the proposed medical procedures which would enable a reasonably prudent patient to make a knowledgeable evaluation of whether to submit to such procedures.

25. Moreover, informed consent forms utilized in the IVF America program of defendants where there were multiple treatment cycles, would not make any explanation whatsoever, but incorporate by reference the informed consent signed for the first of the various treatment cycles.

26. The named plaintiffs and other members of the Class have been deceptively lured into the IVF program of defendants and have been subjected to the outrageous course of conduct described above.

27. The course of conduct described above is of an intentional, wanton and outrageous nature, in callous disregard of the rights and well-being of the named plaintiffs and the members of the Class they represent, and premised primarily on mercenary rather than medical considerations, warranting the award of punitive and exemplary damages.

CLASS ACTION ALLEGATIONS

28. The plaintiffs bring this action on behalf of themselves and all others similarly situated, collectively referred to as the "Class," pursuant to Civil Practice Law and Rules, Article 9.

29. The Class is comprised of all persons who have sought evaluation and treatment from the infertility treatment program of defendants in the State of New York, during the period commencing with the date of the applicable statute of limitations and terminating with entry of Judgment herein, but expressly excluding claims of medical malpractice and/or personal injuries resulting from the treatment provided and/or the administration of drugs used in the IVF program.

30. The number of class members approximates thousands of persons, and is so numerous that joinder of all members is impracticable.

31. The claims of the named plaintiffs are typical of the claims of other members of the Class since they arise out of the same course of conduct as the Class members claims and are based upon the same causes of action.

32. There are questions of law and fact common to the Class which predominate over any questions affecting only individual members. Such predominating questions include:

- (a) Whether the defendants have engaged in unfair and deceptive acts and practices having the capacity, tendency or effect of misleading or deceiving class members in violation of Gen. Bus. L. ("GBL") 349?

- (b) Whether defendants have engaged in false advertising in violation of Gen. Bus. L. 350?
- (c) Whether defendants have fraudulently omitted to reveal material facts regarding the success and failure rates of their IVF program and attendant medical risks?
- (d) Whether defendants have utilized so-called informed consent forms violative of Public Health Law 2805-d(1)?
- (e) Whether defendants have violated their fiduciary medical obligations and the implied contractual obligation of good faith and fair dealing?
- (f) Whether defendants have engaged in conduct resulting in their unjust enrichment?

33. The named plaintiffs will fairly and adequately protect the interests of the Class inasmuch as (i) they have no interests which are antagonistic to those of the Class; and (ii) counsel for the plaintiffs has extensive experience in class action and consumer rights litigation in the federal and state courts, including successfully challenging other IVF-type programs.

34. A class action is the superior and only available method by which class members can fully and fairly obtain redress for their grievances.

FIRST CAUSE OF ACTION **(Unfair and Deceptive Practices)**

35. Each of the allegations set forth in paragraphs 1 through 34 above are repeated and realleged.

36. As a result of the foregoing acts and practices, damages have been sustained by the named plaintiffs and the Class, as defendants have violated the provisions of GBL 349, which prohibit unfair and deceptive practices in the conduct of any business, defined as a course of conduct having the capacity, tendency or effect of deceiving or misleading consumers.

SECOND CAUSE OF ACTION **(False Advertising)**

37. Each of the allegations set forth in paragraphs 1 through 34 above are repeated and realleged.

38. As a result of the foregoing course of conduct, defendants have violated the false advertising provisions of GBL 350 causing damage to plaintiff and the Class.

THIRD CAUSE OF ACTION **(Breach of Fiduciary Medical Obligations)**

39. Each of the allegations set forth in paragraphs 1 through 34 above are repeated and realleged.

40. Defendants are providers of professional medical services and have a special common law and statutory fiduciary relationship to those participating in the IVF program to reveal all material facts relating to evaluation and treatment in the program.

41. Defendants have failed to obtain a proper informed consent from plaintiffs and other members of the Class which would explain to them the basis for eliminating other alternatives to the treatment recommended and the reasonably foreseeable risks and benefits as a reasonable

medical practitioner, under similar circumstances would have disclosed, in a disclaimer permitting the patient to make a knowledgeable evaluation.

42. As a result of this failure of defendants to properly exercise their fiduciary obligation, the plaintiffs and the Class they represent have been damaged.

FOURTH CAUSE OF ACTION

(Breach of Covenant of Good Faith and Fair Dealing)

43. Each of the allegations set forth in paragraphs 1 through 34 above are repeated and realleged.

44. The contractual and fiduciary obligations of the defendants as providers of medical advice and treatment, pursuant to agreement with the named plaintiffs and other members of the Class, are violated by the course of conduct described above in that the obligation of defendants of good faith and fair dealing implied in every agreement was violated, thereby causing damages to the named plaintiffs and the Class.

FIFTH CAUSE OF ACTION

(Fraudulent Omission of Material Facts)

45. Each of the allegations set forth in paragraphs 1 through 34 above are repeated and realleged.

46. Defendants have fraudulently omitted to reveal material facts as to the success and failure rates of their infertility program, and the medical risks to the women in the program, and their offspring, if any, as set forth above.

47. The concealing of such material facts by defendants was done with the intent of deceiving and defrauding the named plaintiffs and other members of the Class, luring them to become participants in the infertility program of defendant.

48. As a result of the foregoing fraudulent omissions to reveal material facts, damages have been sustained by the named plaintiffs and the Class.

SIXTH CAUSE OF ACTION

(Common Law Fraud)

49. Each of the allegations set forth in paragraphs 1 through 34 above are repeated and realleged.

50. Pursuant to a common scheme and method of dissemination of information as to the subject IVF program, defendants have made various representations as to such program, which representations were false when made and known by defendants to be false.

51. The said statements were so made by defendants for the purpose and with the intent of deceiving, defrauding and inducing plaintiffs and Class to enter into costly and emotionally draining infertility programs.

52. The misrepresentations made by defendants were believed to be true and were relied on by plaintiffs and the Class and they were thereby induced to participate in the infertility program of defendants.

53. As a result of such fraudulent conduct plaintiffs and the Class they represent have been damaged.

SEVENTH CAUSE OF ACTION
(Unjust Enrichment)

54. Each of the allegations set forth in paragraphs 1 through 34 above are repeated and realleged.

55. As a result of the practices described above, defendants have been unjustly enriched.

EIGHTH CAUSE OF ACTION
(Negligent Informed Consents)

56. Each of the allegations set forth in paragraphs 1 through 34 above are repeated and realleged.

57. As a result of the practices described above, defendants have been negligent in failing to obtain required informed consents which provided reasonable and understandable explanations of the success rates, risks and alternatives to the proposed medical procedures which would enable a reasonably prudent patient to make a knowledgeable evaluation of whether to submit to such procedures, thereby causing damage to the named plaintiffs and the Class.

WHEREFORE, plaintiffs demand judgment against defendant for themselves and each member of the Class as follows:

- A. Certifying this action as a Class Action.
- B. Requiring defendants to pay damages to the named plaintiff and each member of the Class in such amount as the Court may determine, in connection with the emotional pain, suffering, inconvenience, mental anguish and other pecuniary and non-pecuniary damages caused by the course of conduct of defendants.
- C. Imposing punitive and exemplary damages in an amount equal to treble the damages sustained by plaintiffs and the Class.
- D. Awarding reasonable fees for legal counsel and other experts employed by plaintiff.
- E. Awarding costs and disbursements of this action, together with appropriate interest on the sums found to be due.
- F. Granting such other and further relief as to this Court may deem just and proper.

[Attorney for Plaintiff]