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## Consumer Protection Claims: Provider Liability on the Increase

*Marie C. Infante, Laura J. Oberbroeckling and Karen S. Lovitch*

Long term care and assisted living facilities certainly know of the expanding risks associated with negligence suits brought by residents or their families. However, few providers are aware of what, until recently, has been a fairly well-kept secret—as providers of consumer services, they may face claims brought by consumers based on the provision of “defective” services in the same way that, for example, a tire manufacturer may face claims based on alleged defective products. The risks associated with these types of claims are significant, and, therefore, the recent upswing in such claims has far-reaching consequences for the long term care industry.

In recent months, providers in various states have faced consumer protection claims, either in connection with a negligence suit or as a separate action. Reading between the lines of these lawsuits, one often will see disgruntled family members who think the facility failed to address their concerns. The familiar combination of family expectations, operational errors, staff turnover, some unfavorable outcomes, a list of complaints, and less than optimal efforts at customer relations are a volatile combination in this type of action.

Consumer protection allegations present unique challenges for providers who have not traditionally faced such claims. A provider confronting a claim that it has violated consumer protection laws may not, for example, have adequate insurance coverage for such claims, because general liability insurance does not necessarily extend to them. Moreover, defending a consumer complaint can be difficult as it may not be tied to a particular incident or injury, but instead, to a facility's general business practices. For this reason, a consumer bringing a complaint may not necessarily be required to use expensive expert testimony to prove his or her case and often can find evidence (such as survey reports) in the public domain. Plaintiffs therefore can lower their litigation expenses without lowering their potential for a significant damages award.

Because the risks presented to plaintiffs may be significantly less than those presented to plaintiffs in costly negligence cases, consumer protection claims can be especially hard for providers to resolve. Despite these unique challenges, providers can effectively manage the risks associated with consumer protection claims by taking several actions, which are discussed in more detail below.

### What Is the Basis for a Consumer Protection Claim?

A consumer protection action typically is brought by a plaintiff claiming that a provider has violated a state consumer protection statute. Consumer protection statutes are designed to provide disgruntled consumers with a mechanism for resolving grievances related to false advertising or fraudulent conduct, and they prohibit a wide range of activities by sellers of goods and services. In the long term care context, the plaintiff often alleges that the facility provided false or misleading information to residents and potential residents in its brochures, admissions information or other publications; that residents relied on these representations in seeking services from the facility; and that the facility failed to provide services at the level indicated, resulting in damages, economic or otherwise.

The Colorado Consumer Protection Act (CCPA), for example, allows a plaintiff to sustain a claim in a number of different ways. By way of illustration, a deceased resident's family filed suit against a nursing home last year in Colorado state court claiming that the facility represented that its services were "of a particular standard, quality, or grade" but that it knew or *should have known* they were of another.<sup>1</sup> The plaintiff also alleged that the facility engaged in a deceptive trade practice because it *knowingly* made a false representation as to the characteristics of the services provided in advertising materials and oral representations. The second allegation, based on a different provision of the CCPA, requires a higher standard of proof because the conduct must be "knowing," whereas a claim can be sustained under the first provision if the facility should have known that it misrepresented its services. Regardless of the degree of knowledge required to prove a claim, both provisions are quite general and allow plaintiffs considerable leeway.

Other states, like Massachusetts, have comparable provisions. The Massachusetts Consumer Protection Act broadly prohibits "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce," and an entire section of the regulations is devoted to unfair or deceptive acts or practices of long term care facilities.<sup>2</sup> The following examples are only a few of the many practices described in the regulations as prohibited under the Massachusetts consumer protection statute:

- Failing or refusing to inform a resident (and his or her legal representative or next of kin) of the existence of facility policies, orally and in writing, in clear and conspicuous type, in a language he or she understands, as evidenced by the resident's written acknowledgement.
- Requiring a resident or prospective resident (or his or her legal representative or next of kin) to provide a third party guarantee of payment or to designate a third party to be responsible for giving authorization and consent on his or her behalf as a condition of admission, expedited admission, or continued stay.
- Discharging or transferring a resident without the attending physician documenting the reason for the action in the clinical record, unless the health or safety of others would be endangered, in which case any physician may document the reasons.

The breadth of these regulations obviously would support a wide range of consumer protection claims and, arguably, also could establish a standard of care, a violation of which could give rise to a claim of negligence.

### Who Can Be Held Liable?

Various state courts have found long term care and assisted living providers can be subject to consumer protection claims. For instance, a Colorado trial court made clear that a group of

plaintiffs could pursue consumer protection claims against a nursing home in *Salas v. GranCare*.<sup>3</sup> In that case, a group of residents brought a class action against a nursing home under various state and federal laws, including the CCPA, because the home allegedly failed to deliver the services described in advertising materials.<sup>4</sup> Specifically, the residents alleged that:

- medical and nursing services failed to promote the enhancement of quality of life,
- the home was unclean, unsanitary and unsafe,
- staff members were overworked and underpaid,
- physical restraints were improperly used, and
- care did not meet with federal and state guidelines.<sup>5</sup>

Pennsylvania is another state in which a plaintiff has successfully raised a consumer protection claim against a nursing home. In *Chalfin v. Beverly Enterprises, Inc.*,<sup>6</sup> a federal district court allowed a former resident to allege that a nursing home violated Pennsylvania's consumer protection law by refusing to assist her in filing for Medicaid assistance, as promised in the admissions agreement.

The Texas courts have refused to allow consumer protection claims to proceed against nursing homes if, in reality, they actually amount to a negligence suit based on a deviation from the standard of care. Such cases, according to the Texas courts, are barred by the Medical Liability and Insurance Improvement Act.<sup>7</sup> In other words, Texas law prohibits negligence claims that are merely recast as actions based on representations made by employees or in brochures. However, such decisions do not foreclose the possibility that a Texas court could allow a consumer protection suit to go forward against a nursing home if the claims were framed properly.

In contrast, a lawsuit in Virginia is currently proceeding against an assisted living provider based solely on violations of the Virginia consumer protection law. As a preliminary matter, the provider sought dismissal of the claims because they amounted to negligence allegations, rather than a consumer protection suit. Unfortunately, the trial court agreed with the plaintiff and has ordered the case to proceed to trial.

### Who Can Bring Suit?

Although state courts generally allow consumer protection claims to proceed against long term, assisted living and other health care providers, statutes differ with respect to who may bring suit. Virtually all states allow the state attorney general to bring such claims, but there are significant differences, state-by-state, with regard to who may bring a private action. The California Unfair Business Practices Act (CUBPA), one of the broadest statutes in the country, allows any person to sue on his or her own behalf or on behalf of the general public, without establishing actual injury or damages.<sup>8</sup> It also permits business competitors to bring suit. Therefore, California providers are at risk of facing consumer

claims brought not only by residents or their family members, but also by enterprising plaintiffs' attorneys who represent the "public interest."

Notably, a private party recently filed suit in the public interest against a chain of nursing homes in California state court. In *Swan v. Manor Care of America, Inc. et al.*,<sup>9</sup> an activist for nursing home reform brought suit on behalf of the public for inadequate staffing and widespread care problems at nine facilities, in violation of Section 17535 of the CUBPA, as well as Section 17203 of the state's Unfair Competition Law. The complaint alleged that the facilities promoted themselves as furnishing "the best nursing care available in a warm and comfortable environment" and offering "individualized care plan[s]," "state-of-the-art health care equipment," "stimulating activities," and "first class dietary services," but that the corporation failed to deliver on its promises. This suit obviously could set an unfavorable precedent, and the outcome should be closely watched by the entire health care community. Providers who operate in states with active advocacy groups should pay particularly close attention to this case.

Most states do not have statutes that are as expansive as the CUBPA, but, nevertheless, most of them allow for a wide range of private actions. In Texas, for example, a private citizen may bring suit if he or she was a consumer, if the defendant engaged in false, misleading or deceptive advertising, and if such acts resulted in actual damages.<sup>10</sup> Even so, Texas courts have found that a cause of action does not survive the death of a consumer,<sup>11</sup> which could effectively limit the use of this statute against long term care and assisted living providers in Texas. A federal district court in Pennsylvania also has placed limits on who may bring suit by finding that a resident's family could not raise a consumer protection claim against a nursing home because they did not qualify as consumers under the statute.<sup>12</sup>

### What Remedies Are Available?

Although most consumer protection statutes allow for injunctive relief and other types of non-monetary damages, the remedies available are wide-ranging and frequently include monetary damages and multipliers. Considering that traditional insurance policies often do not cover consumer protection claims, long term care and assisted living providers must pay particular attention to the financial and other ramifications of such claims.

In Michigan, for example, a private plaintiff who is not part of a class action may recover actual damages and reasonable attorneys' fees.<sup>13</sup> Like many state consumer protection statutes, the Michigan Consumer Protection Act does not limit a private plaintiff's actual damages to pecuniary losses—damages for mental distress, for example, are recoverable.<sup>14</sup> A private party also may obtain a declaratory judgment that the conduct at issue was unlawful or seek to enjoin the provider from engaging in such conduct.<sup>15</sup>

Damage awards can be compounded by the fact that treble damages are available in many states. However, in order to be eligible for multiple damages, plaintiffs often must demonstrate that the conduct at issue constituted more than mere negligence. In Colorado, for example, a plaintiff must present clear and convincing evidence (a fairly high legal standard) of "bad faith conduct" to collect such damages.<sup>16</sup> The CCPA defines bad faith conduct as "fraudulent, willful, knowing, or intentional conduct that causes injury."<sup>17</sup> In other words, even if a plaintiff can demonstrate that a provider failed to live up to representations made, the plaintiff still must show that the corporation acted intentionally, not just negligently, to recover treble damages. The Virginia consumer protection statute also authorizes treble damages for "willful" violations.<sup>18</sup>

The Texas statute allows for the recovery of damages but takes a slightly different approach. The Texas Deceptive Trade Practices Act provides for several levels of damages, which increase as the violation becomes more egregious.

Although some states do not provide for actual damages, civil penalties or other relief may be available. For instance, under the California statute, damages are not available, but a private party can seek civil penalties or equitable relief, including an injunction or restitution.<sup>19</sup> In *Swan v. Manor Care*, the plaintiff seeks declaratory and equitable relief, including restitution and/or disgorgement of funds "wrongfully acquired" and court-ordered corrective action, as well as attorneys' fees.

### How Can a Provider Protect Itself Against Such Claims?

All health care providers, especially nursing homes and assisted living facilities, should take immediate steps to protect themselves from consumer actions. Providers should begin by evaluating all facility representations, publications and practices that could be construed as false, deceptive or misleading trade practices and therefore used to prove a consumer protection claim. Such representations, publications or practices may include, but are not limited to:

- admissions agreements;
- all advertising and promotional materials, brochures and letters;
- any oral representations made by admissions coordinators or marketing staff;
- bonus incentive structures for marketing and admissions staff or for the administrator based solely on the number of admissions;
- letters or replies of any nature sent in response to admission inquiries;
- replies or responses of any kind in response to a complaint, which make promises about the care to be provided;

- messages heard by callers when on hold or when calling after hours; and
- print advertising or newspaper ads.

Every provider should review all representations made, as well as staff training policies and procedures, and revise them if necessary to ensure that realistic, objective information about the facility, its staff and services is provided. Representations using absolute terms like "always," "fully," "constant," and the like should be avoided. As an example, when making representations about meals, facilities should avoid statements like "our meals always satisfy" and, instead, promote the nutritional value of the meals.

A facility simply cannot guarantee that every resident will be satisfied with every meal and, therefore, should not make representations that cannot be tested objectively.

The operational environment for long term care and assisted living providers will continue to be characterized by increasing competition for residents and staff and by the onset of more knowledgeable consumers and greater accountability for unfavorable outcomes. For these reasons, lawsuits based upon state consumer protection statutes are likely to become even more prevalent in the near future.

## ENDNOTES

- <sup>1</sup> See Colo. Rev. Stat. § 6-1-105(g).
- <sup>2</sup> See 940 Mass. Regs. Code tit. 940, § 4.00.
- <sup>3</sup> *Salas v. GranCare*, 22 P.3d 568, 570 (Colo. App. 2001). The Colorado Court of Appeals did not discuss the consumer protection claims in detail, but instead addressed a procedural issue. It reversed the trial court's decision that members of the class who were Medicare and Medicaid beneficiaries were required to exhaust administrative remedies because they had alleged violation of federal nursing home standards. See *Salas*, 22 P.3d at 573.
- <sup>4</sup> *Id.* at 570.
- <sup>5</sup> *Id.*
- <sup>6</sup> 741 F. Supp. 1162 (E.D. Pa. 1989).
- <sup>7</sup> Tex. Rev. Civ. Stat. Ann. art. 4590i, §12.01(a); see *Walden v. Jeffery*, 907 S.W.2d 446, 447-48 (Tex. 1995); *Sorokolit v. Rhodes*, 889 S.W.2d 239, 242; *Mulligan v. Beverly Enterprises-Texas, Inc.*, 954 S.W.2d 881, 884 (Tex. App. 1997); *Waters ex rel. Walton v. Del-Ky, Inc.*, 844 S.W.2d 250 (Tex. App. 1992).
- <sup>8</sup> Cal. Bus. and Prof. Code § 17535.
- <sup>9</sup> No. BC250057 (Cal. Super. Ct., Los Angeles County, complaint filed May 8, 2001).
- <sup>10</sup> See *Sterber v. Hunter*, 221 F.3d 701 (5th Cir. 2000); *Dagley v. Haag Engineering Co.*, 18 S.W.3d 787 (Tex. App. 2000).
- <sup>11</sup> *Lukasik v. San Antonio Blue Haven Pools, Inc.*, 21 S.W.3d 394 (Tex. App. 2000). There, the court held that the parents of a boy who drowned could not bring suit against a pool company under the Texas Deceptive Trade Practices Act because the cause of action did not survive the death of the original consumer (i.e., the boy). *Id.*
- <sup>12</sup> *Chalfin v. Beverly Enterprises*, 741 F. Supp. 1162 (E.D. Pa. 1989).
- <sup>13</sup> Mich. Comp. Laws § 445.911(2).
- <sup>14</sup> See *Avery v. Industry Mortg. Co.*, 135 F. Supp. 2d 840 (W.D. Mich. 2000).
- <sup>15</sup> Mich. Comp. Laws § 445.911(1)(a)-(b).
- <sup>16</sup> Colo. Rev. Stat. § 6-1-113(2)(a)(III), (2.3).
- <sup>17</sup> Colo. Rev. Stat. § 6-1-113(2.3).
- <sup>18</sup> Cal. Bus. and Prof. Code § 17536.
- <sup>19</sup> Cal. Bus. and Prof. Code § 17535.

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