

NURSING HOME EXPOSURE TO DAMAGES UNDER THE CONSUMER PROTECTION STATUTE: THE END OF AN ERA THAT NEVER BEGAN?

By Joseph Desmond

The Massachusetts Consumer Protection Statute, M.G.L. c. 93A, has been used as a potent weapon in recent years in cases against nursing homes alleging neglect and abuse of elders. Plaintiffs have argued that the applicable attorney general's regulations provide a springboard to an automatic award of attorneys' fees and costs if they are successful in proving a violation of any state or federal regulation that results in damages to a resident.

In *Darviris v. Petros*,¹ the Supreme Judicial Court held that a medical provider's simple negligence resulting in a violation of M.G.L. c. 111, § 70E ("The Patients' Bill of Rights") does not, in and of itself, constitute a violation

of chapter 93A. The court rejected the plaintiff's argument that the attorney general's regulations establish a *per se* violation of the Consumer Protection Statute.² Rather, a plaintiff must prove that any such violation was an "unfair or deceptive" act or practice to constitute an actionable claim under chapter 93A. Such a finding may be made only upon a showing that the medical provider's actions were related to the business or entrepreneurial aspect of the provider's activities. While the *Darviris* decision provides definitive authority to defeat claims asserting a strict liability claim, the attorney general's regulations were never successfully used to support an award of multiplied damages and/or attorneys' fees in the context of long-term patient care litigation in Massachusetts prior to the decision.³

Nursing home liability pursuant to the attorney general's regulations

The attorney general has promulgated regulations pursuant to M.G.L. c. 93A, § 2(c) to promote the protection, comfort, health and well being of nursing home residents. The regulations define acts and practices that constitute unfair and deceptive acts and practices prohibited by the Consumer Protection Statute. The regulations also provide that it "shall be" an unfair and deceptive act and a *per se* violation of the Consumer Protection Statute for a nursing home or the administrator of a nursing home to fail to comply with any existing state or federal statute, rule or regulation which provides protection to residents of long-term nursing care facilities.⁴ A literal reading of the regulation would therefore require strict compliance with the Massachusetts Patients' Bill of Rights (M.G.L. c. 111, § 70E), the Department of

Public Health regulations (105 C.M.R. 150 et. seq.), the attorney general's regulations (940 C.M.R. 4.00, et. seq.), the Nursing Home Reform Act (42 U.S.C. 1395i-3, 1396r) and the Federal Health Care Financing Administration Regulations (42 C.F.R. 483, et. seq.) to avoid strict liability and exposure to punitive damages and attorneys' fees under the Consumer Protection Statute.

Federal and state regulations govern every aspect of a nursing home's care of its residents. The regulations broadly require nursing homes to ensure that residents attain the "highest practicable physical, mental and psycho-social well being."⁵ In addition to this general mandate, the various regulations cited above provide particularized requirements for staffing,⁶ resident assessments,⁷ use of restraints,⁸ accident prevention,⁹ prevention of pressure sores,¹⁰ as well as the right to participate in medical decisions.¹¹ As a result, nearly every nursing home negligence case has been accompanied by a 93A count citing one or more of the dozens of applicable regulations as the linchpin of the 93A claim. This interpretation has motivated some plaintiffs to launch "scorched earth" discovery campaigns against nursing homes in an attempt to artificially inflate the settlement value of cases by virtue of the presumed exposure to attorneys' fees in cases where there is a clear violation of a regulation.

Darviris v. Petros

Until recently, there was no Massachusetts appellate authority addressing the issue. In *Darviris*, the Supreme Judicial Court held that simple negligence in the provision of medical care that results in a violation of an applicable regulation does not, by itself, constitute a violation of M.G.L. c. 93A, ("the Consumer Protec-



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tion Statute"). The court further held that although the attorney general's regulations state that any violation of the Patients' Bill of Rights is a *per se* violation of the Consumer Protection Statute, a plaintiff must nonetheless prove that any such violation was an "unfair or deceptive" act or practice to constitute an actionable claim under 93A. Such a finding may be made only upon a showing that the medical provider's actions were related to the business or entrepreneurial aspects of the provider's activities.

The plaintiff's complaint in *Darviris* alleged multiple theories of recovery for the defendant's failure to obtain his patient's consent for a hemorrhoidectomy — simple battery, failure of informed consent, violation of M.G.L. c. 111, § 70E (the "Patients' Bill of Rights") and violation of M.G.L. c. 93A. The plaintiff relied upon 940 C.M.R. § 3.16(3) to argue that, even if her surgeon was merely negligent in failing to obtain her consent to perform a hemorrhoidectomy, a 93A claim was still viable. That regulation states that an act or practice is a violation of the Consumer Protection Statute if it "fails to comply with existing statutes, rules, regulations or laws, meant for the protection of the public's health, safety, or welfare ..." The plaintiff argued the patient's Bill of Rights is such a statute because it requires physicians to provide their patients with the right "to informed consent to the extent provided by law." Therefore, the plaintiff argued every violation of the statute constitutes a *per se* violation of the Consumer Protection Statute.

In ruling against the plaintiff's claim that the unauthorized surgery constituted an unfair or deceptive act in violation of 93A, the Supreme Judicial Court noted that it had "no hesitancy" in concluding that the negligent delivery of medical care, without more, does not qualify for redress under the Consumer Protection Statute. The court reasoned that the legislature's intent in enacting a comprehensive medical malpractice statute (M.G.L. c. 231, § 60B, *et seq.*) was to provide an exhaustive statutory scheme to govern all medical malpractice cases, thereby limiting the growing insurance crisis in the medical profession. The court held that the legislature expressly or implicitly covered the malpractice field in such a way that precluded further remediation by the Consumer Protection Statute. The court further noted that the breadth and scope of the medical malpractice statute — requiring a screening by a tribunal, a

shortened statute of limitations for minors and limits on recovery for pain suffering — demonstrated the legislature's clear intent to "cover the field" in the arena of medical malpractice litigation. Expanding the scope of damages available to plaintiffs in medical malpractice cases as proposed by *Darviris* would permit an end-run around the clear intent of the legislature in enacting the medical malpractice statute.¹²

The court cautioned that not all conduct of medical providers is beyond the reach of the Consumer Protection Statute. As appellate courts in other jurisdictions have ruled, consumer protection statutes may be applied to the entrepreneurial and business aspects of providing medical services, such as unfair billing or advertising practices.¹³ In an attempt to persuade the court that the surgery was related to the business aspect of Petros' practice, *Darviris* argued that her doctor's failure to obtain her informed consent to perform a hemorrhoidectomy constituted a violation of 93A because the surgery may have resulted in his financial gain. The court concluded that the evidence did not support a finding that Petros performed a hemorrhoidectomy as opposed to a fissurectomy for his own financial gain. In rejecting this argument, the court held that a patient must demonstrate that the medical provider selected the treatment solely for his or her financial benefit in order to prove that the provider acted "unfairly or deceptively."¹⁴

The court also rejected the plaintiff's argument that the attorney general's regulations establish a *per se* violation of the Consumer Protection Statute by a simple finding of a violation of the Patients' Bill of Rights. The court noted that the attorney general's rule-making power is limited to the concepts of deception or unfairness, as guided by the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) (2000). The attorney general's power to regulate is further limited where the regulations are in conflict with existing legislation. Applying a strict liability theory to malpractice cases based upon a violation of the Patients' Bill of Rights would conflict with the remedies set forth by the legislature in its enactment of the malpractice statute. Accordingly, the attorney general's regulations do not provide an independent basis for a 93A claim in the absence of an "unfair or deceptive" act arising from the commercial aspect of a provider's medical practice.

Application of *Darviris* holding to nursing home litigation

The *Darviris* decision has been applied to preclude a *per se* finding of a violation of the Consumer Protection Statute in the nursing home context. In *Manson v. Broad Reach*,¹⁵ a Barnstable Superior Court jury awarded \$125,000 in a wrongful death action in which the plaintiff claimed that the nursing home failed to transfer the resident out of the facility in a timely fashion resulting in the resident's death from pneumonia. The resident was 75 years old at the time of her admission to the Liberty Commons Nursing Home in August 1996. She had a history of diabetes, depression, arthritis, coronary artery disease, cancer in her neck, and a recent history of heart attack. The resident contracted pneumonia on or about Nov. 15, 1996, and the condition was reported to her physician. Her condition deteriorated over the next two days and she died on Nov. 17.

The trial judge found in favor of the defendant on the 93A count and declined to award attorneys' fees and costs. The trial judge found that the alleged violations of the Consumer Protection Statute (failing to provide the highest practicable level of care and failing to notify the physician) were insufficient to constitute an "unfair or deceptive" act under chapter 93A. The plaintiff asserted that Liberty Commons breached two federal regulations governing long-term care facilities, 42 C.F.R. § 483.10¹⁶ and § 483.25,¹⁷ which, in plaintiff's view, constituted a *per se* violation of c. 93A.

The court agreed that a literal reading of 940 C.M.R. § 4.02(1) would make noncompliance with *any* state or federal law governing long term care facilities an "unfair or deceptive" act for the purposes of chapter 93A. Notwithstanding the applicable regulations, the court reasoned that such a draconian result was clearly not intended by the legislature in enacting the statute, the purpose of which was to improve the commercial relationship between consumers and businessmen and to protect the public by encouraging more equitable behavior in the marketplace. Rather, the court concluded that it must consider all of the salient facts and circumstances in determining whether a statutory violation involves unfair or deceptive conduct.

The *Manson* court discussed the "highest

practicable quality of care" regulation and concluded that it does not transform every unfortunate result in a nursing home into an unfair or deceptive act. The court further noted that it is doubtful that the legislature intended to view every case of less than the "highest practicable" medical care in a nursing home as a consumer protection violation warranting the punitive remedy of multiplied damages and attorneys' fees. Rather, the court reasoned, the critical question is whether the substantive regulation invoked by the plaintiff seeks to protect nursing home residents from unfairness or deception or whether the alleged violation of the regulation in fact produced unfairness or deception.

At least one trial court has declined to extend the *Darviris* ruling one step further by denying a defendant's motion to dismiss the plaintiff's 93A count for failure to state a cause of action upon which relief may be granted. In *Daher v. Methuen Nursing & Rehabilitation, Inc.*,¹⁸ the plaintiff alleged that she sustained multiple falls resulting in a fractured hip, and also alleged that she suffered pressure sores which became infected due to the negligence of the nursing home staff. The plaintiff's 93A count asserted that the defendant misrepresented the quality of services that would be provided to the plaintiff, and further that the nursing home failed to provide the services for which they charged the resident.

The defendant moved to dismiss the 93A count, arguing that the reasoning of the Supreme Judicial Court in *Darviris* precluded a finding of a violation of the Consumer Protection Statute. The defendant contended that the *Darviris* holding compelled a dismissal as a matter of law because the plaintiff's allegations of negligence did not involve the "entrepreneurial or business" aspects of the provision of health care. The plaintiff countered by arguing that her allegations of misrepresentation concerning the quality of services the defendant would provide was sufficient to satisfy her burden at the pleading stage as to the "entrepreneurial or business aspect" element of a 93A claim in the healthcare setting.¹⁹

The court denied the motion to dismiss, noting that the plaintiff's complaint "barely" contained sufficient allegations of misrepresentation and unfairness to avoid dismissal under the principles articulated in the *Darviris* decision.

Pre-*Darviris* results in the trial court in cases against nursing homes

Despite the proliferation of 93A claims and lawsuits against long-term care providers in the past decade and the availability of a strict liability argument, plaintiffs were unable to win a single judgment awarding damages under the Consumer Protection Statute at trial. While long term care providers and their insurers undoubtedly settled countless cases prior to trial in part due to the potential exposure to attorneys' fees and costs under the Consumer Protection Statute, the few 93A claims tried to verdict failed to yield a plaintiff's verdict on a 93A claim.²⁰

In *Connors v. Lifecare Centers of America*,²¹ Plymouth Superior Court No. 95-1948, a jury returned a verdict against the defendant nursing home and awarded the plaintiff \$646,768 in compensatory damages. The plaintiff was a 94-year-old resident of the defendant's nursing home who sustained a fractured nose, a fractured jaw and a cerebral concussion as a result of an unattended fall. The plaintiff was brought to the hospital and suffered a grand mal seizure upon arrival. Her neurologist determined that she had developed a seizure disorder which left her permanently disabled as a result of the fall.

The accident occurred while the plaintiff was attempting to walk down a hallway toward a nurses' station with the assistance of a rolling walker. As she attempted to walk, the plaintiff fell forward and sustained injuries when the front of her face and head hit the floor. At the time of the plaintiff's fall, several nursing home staff members were located at the nearby nursing station. They observed the plaintiff walking toward the nurses' station using only a rolling walker to assist her. The plaintiff had sustained five falls since her admission to the nursing home in the preceding four months, and the resident assessment and care plan indicated that she required a "one-person physical assist." Despite this directive, none of the staff attempted to physically assist the plaintiff as she approached the nurses' station.

According to the plaintiff, the nursing home breached its duty under 42 C.F.R. 483.20 to conduct a comprehensive assessment of the resident's needs and ability to perform

daily life functions after a significant change in the resident's physical or mental condition. In addition, the plaintiff argued that the nursing home breached its duty under 42 C.F.R.

483.25 to ensure that the plaintiff received adequate supervision and assistance to prevent accidents. These alleged regulatory violations served as the basis for the plaintiff's 93A claim.

Following a jury verdict in favor of the plaintiff on the negligence count, the Superior Court, ruling separately on the plaintiff's 93A claim, found in favor of the defendant nursing home because the plaintiff failed to send a proper demand letter prior to filing suit pursuant to M.G.L. c. 93A, § 9. The court found that the plaintiff's 93A demand letter was defective because it failed to contain a reasonable description of the plaintiff's injury and also failed to state a damage figure that would have provided the defendant with an adequate basis to evaluate the plaintiff's claims. Accordingly, the court dismissed the 93A action.

Despite the court's dismissal of the 93A action, the Superior Court judge made additional findings of fact and rulings of law to address the plaintiff's 93A claim in the event that the appeals court determined that the plaintiff's 93A demand letter was sufficient. The trial court found that the failure of the nursing staff to physically assist the plaintiff as she attempted to walk toward the nurses' station with the aid of a rolling walker constituted mere negligence and did not rise to the level of a willful or knowing violation of the applicable regulations. The court agreed, however, that the defendant violated 42 C.F.R. 483.25(h)(2) by failing to provide adequate supervision and assistance to prevent the plaintiff from falling. The court reasoned that the violation of this federal regulation constituted an "unfair or deceptive" act by operation of 940 C.M.R. 4.02(1)²². In light of these findings, the court concluded that the plaintiff would have been entitled to recover attorneys' fees and costs on the 93A claim had there been a proper demand pursuant to M.G.L. c. 93A, § 9(3).²³ Notwithstanding these findings, the trial court dismissed the 93A action in light of the procedurally flawed demand letter.

Prior to the appeal, the parties agreed that the 93A damages would be \$100,000 plus attorneys' fees in the event that the appeals court found that the procedural flaw was not

