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## Nursing-Home Cases On Rise In Massachusetts



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Recent developments in both nursing-home litigation and legislation in Massachusetts demonstrate that the nursing-home industry is facing greater exposure to civil liability and state-imposed sanctions than ever before.

While Massachusetts nursing homes have avoided highly publicized, multi-million-dollar verdicts for inadequate care that have been commonplace in Texas and other states, exposure to the full panoply of applicable civil penalties and increased verdicts have recently been reported in the commonwealth.

Media attention of substandard care at long-term facilities in Massachusetts is expanding. Not surprisingly, more cases of alleged nursing-home abuse and neglect are resulting in larger verdicts and settlements for Massachusetts nursing-home residents, and unprecedented civil penalties are being recovered by the Attorney General's Office.

In addition to the unfavorable results in the courtroom, Massachusetts lawmakers are considering several bills that would increase minimum staffing requirements and impose additional civil penalties for a facility's failure to comply. This comes at a time when staffing shortages are already the likely culprit in many cases of alleged abuse and neglect, and when civil penalties recovered by the attorney general are higher than ever before.

The federal government is also taking additional steps to address the issue of resident neglect and abuse. A congressional report released in July reported that over 30 percent of the nation's 17,000 nursing homes were cited for abuse violations between January 1999 and January 2001.

Legislation has been introduced in Congress to require new safeguards for the more than 1.5 million people currently living in the nation's nursing homes, and calls for tougher sanctions for neglect and mandatory criminal background checks for nursing-home employees.

FOCUS ON  
LITIGATION

In November, the Bush administration announced a pilot project scheduled to commence in January 2002 in five states to assist elderly Medicare recipients find quality nursing homes.

The Centers for Medicare and Medicaid Services will begin collecting information in Colorado, Maryland, Ohio, Rhode Island and Washington to compare the quality of care between facilities, including such data as the prevalence of physical restraints and contraction of new infections.

Medicare is encouraging other states to voluntarily participate in the program, while the Massachusetts Department of Public Health already publishes the results of annual surveys of all Massachusetts nursing homes.

In Massachusetts, recent verdicts in both civil enforcement actions brought by the AG and civil actions brought by residents have resulted in larger awards against nursing homes.

### Actions By The AG

Last January, the Attorney General's Office obtained a judgment for civil penalties against Shirley Manor, Inc. and its proprietor, Wayne LaJoie, in the amount of \$1.01 million, plus attorneys' fees and costs.

During the course of its inspections of the premises and resident records, the Department of Public Health documented 135 incidents of abuse, mistreatment and neglect. On behalf of the department, the AG's Office commenced a civil enforcement action pursuant to G.L.c. 111, §72-73, and G.L.c. 93A, §4.

The complaint sought damages in the amount of \$2,500 for each violation of G.L.c. 111, §72K, and \$5,000 pursuant to the consumer protection statute for each violation.

In addition, the operators of the facility were declared unsuitable to maintain a nursing home and a receiver was appointed to close out the operation.

In November, the U.S. Bankruptcy Court approved an agreement for judgment in the matter, declaring that the judgment for civil penalties entered personally against LaJoie was "nondischargeable" in bankruptcy.

The AG's Office has also reported a significant settlement paid by Pioneer Health Care this year in settlement of allegations of neglect of its residents at the Franvale Nursing Home.

The allegation specifically included inadequate staffing and training resulting in medication errors, inadequate nutrition and insufficient supervision resulting in accidents.

Pioneer also paid \$660,000 to settle allegations that it billed the state Medicaid program for services it did not provide. The Franvale facility was receiving an average of \$227,000 per month to care for approximately 80 residents covered by the state Medicaid program.

In addition to the potential state action for fraud, the Federal False Claims Act provides additional remedies in cases of fraudulent billing by nursing homes that receive funding from the federal Medicare program.

The federal government has successfully prosecuted such claims in other jurisdictions, though no federal actions have been reported to date in Massachusetts.

Importantly, the Federal False Claims Act provides incentives to "whistleblowers," who are entitled to between 15 and 30 percent of the government's recovery, depending upon the level of involvement.

## **Civil Actions By Nursing Home Residents**

### **Compensatory Damages**

Under Massachusetts law, a nursing-home resident may recover compensatory damages resulting from the neglect or abuse by nursing-home staff.

A resident may make a prima facie showing of negligence by demonstrating that the nursing home 1) violated any applicable state or federal regulation; 2) violated an internal nursing-home policy concerning patient care; 3) failed to comply with physician's orders with respect to the care of the resident; or 4) failed to meet the standard of care with respect to the resident's treatment by introducing expert testimony.

Expert testimony is not required in garden-variety cases in which a resident requires attendance and none is provided.

### **Punitive Damages**

The violation of any state or federal regulation pertaining to long-term resident care is a per se violation of the consumer protection statute entitling the resident to an award of reasonable attorneys' fees.

The nursing home is also exposed to an award of double or treble damages if the violation of the regu-

lation is a "knowing or willful" violation. Therefore, strict compliance with the Massachusetts Patients' Bill of Rights (G.L.c. 111, §70E), the Department of Public Health regulations (105 C.M.R. 150, et seq.), the AG'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.) is absolutely essential in avoiding exposure to punitive damages.

The regulations mandate the minimum standards of care concerning nearly every part of a resident's care, including:

- use of restraints;
- medication procedures;
- dietary and rehabilitation plans;
- staffing requirements;
- documentation of resident's care; and
- periodic reevaluation of resident's care plan.

Failure to comply with any of these requirements, or to otherwise promote "a dignified existence" may result in punitive damages pursuant to the consumer protection statute.

### **Massachusetts Cases**

Several Massachusetts cases alleging nursing-home neglect have already resulted in significant jury verdicts. One Plymouth County jury verdict illustrates the growing nationwide trend towards larger verdicts and the potential exposure to punitive damages in nursing-home litigation.

In *Connors v. Lifecare Centers of America*, Plymouth Superior Court No. 95-1998, 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, fractured jaw and cerebral concussion. The plaintiff was brought to the hospital and suffered a grand mal seizure upon her arrival at the hospital. Her neurologist determined that she had developed a seizure disorder, which left her permanently disabled as a result of the fall.

The jury found that the physical injuries proximately caused the resident's seizure disorder.

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 approached the nurses' station, the plaintiff fell forward and struck her face and head on 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 staff members were aware that the plaintiff had sustained five falls since her admission to the nursing home in the preceding four months.

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 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 violation of 42 C.F.R. 483.20.

In addition, the plaintiff argued that the nursing home breached its duty to ensure that the plaintiff received adequate supervision and assistance to prevent accidents in violation of 42 C.F.R. 483.25. The violation of the internal care plan and federal regulations resulted in the large compensatory damages award.

Following the jury verdict in favor of the plaintiff on the negligence count, the Superior Court judge, in 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 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 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 court found 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 concluded that a violation of this federal regulation constituted an unfair or deceptive act under 940 C.M.R. 4.02(1).

In addressing the issue of punitive damages, the 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.

The court concluded that the failure did not rise to the level of a willful or knowing violation of the applicable regulations and, therefore, declined to award multiple damages pursuant to G.L.c. 93A.

The court further concluded that the plaintiff would have been entitled to recover attorney's fees and costs incurred in connection with the 93A claim had there been a sufficient and proper demand pursuant to G.L.c. 93A, §9(3).

In declining to award punitive damages, the court implicitly rejected the plaintiff's contention that the "willful or knowing" requirement of G.L.c. 93A, §9(3) could be demonstrated solely by showing a violation of a regulation, which the defendant is charged with knowing as a function of his profession.

In support of this contention, the plaintiff argued that the reasoning of the Appeals Court in *Whelihan v. Markowski*, 37 Mass. App. Ct. 209 (1994), was applicable to a nursing home's violation of the applicable regulations.

In *Whelihan*, the Appeals Court upheld an award of treble damages as a result of a commercial landlord's violation of the building code.

In that case, the defendant building manager repaired cracked glass in the kitchen storm door of an apartment and replaced it with ordinary window glass. The state sanitary and building codes required the use of safety glazing material. A tenant suffered severe lacerations when the glass broke as she pushed against the glass to open the door.

The Appeals Court affirmed the award of treble damages based solely upon the code violations, finding that the defendant "chose to remain uninformed about building code requirements."

The court reasoned that ignorance of the applicable codes was sufficiently egregious conduct to justify treble damages. See *Whelihan* at 213.

The *Connors* case was settled before the Appeals Court had the opportunity to review the issue. Accordingly, there is no reported Appeals Court decision addressing the issue of whether punitive damages may be imposed solely as a result of a violation of a state or federal regulation.

The Ohio Appeals Court upheld such an award under a similar consumer protection statute in *Blancett v. Nationwide Care, Inc., d/b/a Cambridge Health Care Center*, 1998 Ohio App. LEXIS 6504 (Dec. 16, 1998).

In *Blancett*, a jury awarded the plaintiff \$168,000 in compensatory damages and \$850,000 in punitive damages as a result of a fatal fall in which the plaintiff struck her head, sustaining a subdural hematoma.

The resident was an 82-year-old woman who sustained two falls in the course of one week while a resident of the defendant's nursing home. The evidence demonstrated that the nursing home had no policy in place to ensure that staff received information about a resident's condition and also showed that there was an inadequate fall prevention policy in violation of state regulations.

The Ohio Appeals Court held that, under Ohio law, punitive damages may flow directly and simply from the failure to provide adequate and appropriate care under the applicable nursing-home regulations.

## Conclusion

Additional legislative measures are needed to address the problems confronting nursing homes. One Senate bill proposes a direct care worker reserve fund to ensure staffing and increase pay to direct care workers.

It seems however, that the majority of action currently directed at nursing homes is to punish for inadequate care rather than addressing the problem of shortage of qualified staff to serve the more than 55,000 nursing-home residents in Massachusetts.

Massachusetts courts will likely see a continuing proliferation of nursing-home cases in the future as a result of the increasing media scrutiny concerning the quality of care provided by long-term nursing homes.

The potential for attorneys' fees and punitive damages for regulatory violations will provide additional motivation for potential plaintiffs and encourage more lawsuits.

While it remains to be seen whether the punitive damages will be imposed solely as a result of a violation of a state or federal regulation, the growing number of nursing-home cases suggests that this question will be answered sooner rather than later. **MMW**

