

NURSING HOME AND ASSISTED LIVING ABUSE LITIGATION

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We are an aging population. The need for assisted living and nursing home care is growing rampantly. So is the decline in quality of care. A phrase that is being heard repeatedly is ‘profits before people’ and the attorneys practicing in this field conduct extensive discovery when ‘corporate greed’ is suspected.

In October, 2010, the American Association for Justice (formerly American Trial Lawyers Association or ATLA) issued the following press release:

Standing Up For Seniors: How the Civil Justice System Protects Elderly Americans

Nursing homes are now big business. Corporate chains are anticipating a flood of baby boomers moving into their facilities over the next few years. This increased emphasis on profits has led to a distressing rise in neglected and abused seniors.

Between 2000 and 2008, instances of “immediate jeopardy”—violations likely to result in serious harm or even death—rose 22 percent. More than 90 percent of all nursing homes were guilty of at least one violation.

There are many laws and regulations aimed at protecting seniors. Yet government agencies, non-profit watchdogs and media organizations consistently report that serious problems exist in our nation’s nursing homes.

The same is true of insurance companies that mislead and defraud vulnerable seniors. Insurance industry regulators protest that they can do nothing. Even when they do raise their hands, they more often than not strike deals to keep fines to a minimum and settlements secret.

With the regulatory and legislative bodies unable to cope with a groundswell of neglect and abuse, the civil justice system has stepped into the breach. Attorneys who represent our nation’s seniors, and their families, play a critical role in uncovering abuse and neglect, and are the most effective force to compel corporate nursing homes to fix their conduct.

Nursing Home Cases Are Different Than Medical Malpractice Cases

A medical malpractice case centers on a deviation from care by a physician which caused a physical injury. Nursing home cases usually involve the violation of NJ statutes and regulations (federal and state) which result in the loss of dignity and enjoyment of life, pain and suffering and possible wrongful death. The focus in medical malpractice cases is what happened. The focus in assisted living and nursing home cases is why did it happen. Many times, the answer to this question is that the facility is very profitable and cut corners in providing services so that it could be more profitable. As a result of cutting corners, the resident suffered a loss of dignity, injury, pain, a shortening of life and a loss of enjoyment of whatever time the resident had to live.

Usually, the first words out of defense counsel in a nursing home case is that it is not worth significant money because the person is elderly, had multiple co-morbidities and a short period of time to live. This attitude by defense counsel is a medical malpractice thought process which is wrong for nursing home/assisted living cases. In nursing homes and assisted living, the focus is that the facility, which is usually very profitable, cut corners for their own financial gain and as a result, the residents suffered pain and did not have the opportunity to live the last periods of their life in a dignified manner. Although it would be improper (under the “golden rule”) to ask a jury how much they would pay to live their life without pain and indignity, a properly prepared case would plant this seed in the jury’s mind by introducing evidence of the cost cutting mentality of the facility at the expense of the elderly.

Nursing Home Bill of Rights

New Jersey has codified the rights of nursing home residents which can be found at

N.J.S.A. 30: 13-5. Upon admission, the nursing home administrator is required to give each resident or his/her guardian, a written notice of this bill of rights. The administrator must also post this notice in a conspicuous, public place in the nursing home. N.J.S.A. 30: 13-7.

Some of the highlights of this bill of rights are:

- the right to wear one's own clothing;
- the right to retain personal property in one's own immediate living quarters;
- the right to receive and send unopened correspondence and unaccompanied access to use of a telephone during reasonable hours and the right to have a private telephone at the resident's expense;
- the right to retain the services of one's own personal physician;
- the right to have visitation with any persons at any reasonable hour;
- the right to a safe and decent living environment and considerate and respectful care that recognizes the dignity and individuality of the resident;
- the right to confidentiality and privacy concerning ones's medical condition and treatment;
- the right to receive, upon request food that meets the resident's religious dietary requirements.

The New Jersey Bill of Rights provides for a direct cause of action for violations of the resident's rights. Either the resident or his/her guardian an bring the action. N.J.S.A. 30: 13-8. The statute allows for punitive damages and reasonable attorneys fees and costs.

Since the vast majority of nursing homes accept Medicare or Medicaid reimbursement, the Nursing Home Reform Act also known as the Omnibus Reconciliation Act if 1987 (OBRA) 42USCA 1396R is applicable. OBRA sets forth the standard of care in its regulations which are commonly referred to as "F" tags. These regulations address such issues as staffing, nutrition,

hydration, pressure ulcer prevention, maintenance, personal hygiene, therapy, improper use of restraints, abuse, dignity, quality of life, activities of daily living etc.. By way of example, the regulations provide that patients with pressure ulcers must be turned, repositioned, given the appropriate mattress, receive treatments etc.. Additionally long term care facilities are governed by the regulations contained in NJAC 8: 39-1 et. seq..

A typical nursing home lawsuit will contain multiple causes of action of which the violation of the Nursing Home Bill of Rights is only a small part. There may also be claims against individual nurses, aides, management personnel and physicians for negligence. There may be contractual claims for breach of contract of the resident's agreement with the facility. Many times, nursing homes are owned and administered by a complex chain of subsidiaries and related companies. A detailed analysis of these entities may show that the nursing home is siphoning money that should be devoted to resident care. For instance, services may be outsourced for unreasonable fees to other companies which have common ownership or each entity expends a large salary to the same group of individuals.

A developing theory of liability is corporate negligence - the various entities that siphoned off money that should be used for resident care has caused the negligent care and abuse. This theory is a common law negligence theory. An expert is not needed nor is it necessary to advance the difficult theories of piercing the corporate veil or asserting an alter ego relationship.

Arbitration Clauses in Nursing Home Agreements

Many nursing home agreements have arbitration clauses which attempt to limit the right to sue and the right to recover when a resident is injured due to negligent abuse and neglect. Clients should be advised to strike out arbitration clauses. In drafting a power of attorney, there

should be language limiting the power to agree to such clauses.

If an agreement containing an arbitration clause is signed, all is not lost. First, if the nursing home only accepts New Jersey residents and uses New Jersey vendors, New Jersey has a statute, N.J.S.A. 30:13-8.1, which declares such arbitration clauses void as against public policy.

Most nursing homes are part of larger conglomerations which operate across state lines and use out of state vendors. Therefore, federal law will apply. In The Estate of Anna Ruzala v. Brookdale Living Communities, Inc., et. al. and Ida Azzaro v. Brookdale Living Communities et. als. (August 10, 2010), the Appellate Division ruled that the Federal Arbitration Act, which favors and allows arbitration, preempts the New Jersey statute.

The next question is whether the arbitration clause is enforceable. In The Estate of Anna Ruzala, the Court found certain arbitration provisions to be unenforceable under the doctrine of substantive unconscionability. Also, the clauses can be challenged for procedural unconscionability which the Court found unnecessary to address under the facts of the case. Procedural unconscionability involves a hearing as to whether a valid contract was formed.

The Appellate Division made several findings regarding these types of nursing home residency agreements:

1. Residency agreements are contracts of adhesion which is the first step in the analysis of whether a contract, or any specific terms therein, should be deemed unenforceable based on policy considerations;
2. The court looks to four factors: (a) the subject matter of the contract; (b) the parties' relative bargaining positions; (c) the degree of economic compulsion motivating the 'adhering party; and (d) the public interests affected by the contract.

The Appellate Division found that there are global characteristics that every potential nursing home resident shares: inability to continue to live in their homes due to ill health, advanced age, or both; and that the Legislature, in adopting the Nursing Home Responsibilities and Rights of Residents Act has identified nursing home residents as a vulnerable group of consumers, entitled to special protection against economic abuse, personal privacy abuse, the deprivation of their right to choose their own health care professionals, and an array of other abuses that speak to the core of human dignity; and the imbalance of resources that create relative inferiority in the bargaining position of nursing home residents.

The Appellate Division focused on the public interests affected by the nursing home agreement. The Court concentrated on whether the effect of the arbitration clause provisions that significantly restrict discovery, limit compensatory damages and prohibit punitive damages shield the nursing home from compliance with the laws of the state. The Court found that the restrictions on discovery with limits on compensatory damages and outright prohibition of punitive damages form “an unconscionable wall of protection for nursing home operators seeking to escape the full measure of accountability for tortious conduct that imperils a discrete group of vulnerable consumers.” The Court held that these provisions in the arbitration clause of a residency agreement are void and unenforceable. The Court severed the offensive provisions from the rest of the agreement but allowed the arbitration to proceed. Therefore, it is very important to do discovery and challenge such agreements on the basis that a valid contract was not formed.

Assisted Living Facilities and Residential Care Facilities

The Nursing Home Statute does not apply to assisted living and residential care facilities. Therefore, OBRA regulations cannot be used for negligence in abuse cases for residents in these

type of facilities. Also, there aren't any statutes that address these facilities. However, there are regulations, NJAC 8:36-1 et. seq. for assisted living and NJAC 8: 43-1 et. seq. for residential care facilities which can be used to establish the standard of care.. With respect to standard of care, these regulations are basically the same.

Many cases against these facilities arise because the resident was not appropriate for the more limited care being offered by these facilities and requires the attention given in a nursing home. For instance, residents who are fall risks, have dietary risks or alzheimers may not be appropriate for these facilities. However, the facility in pursuing its financial interest, did not follow the regulations in assessing whether the person was appropriate for placement in its facilities.

Many elderly people do need assistance with their activities of daily living but do not need nor want nursing home care. For these people, it is important to establish on admission that the person requires specific assistance in a certain area. For instance, a person may be prone to falls and should be evaluated as a fall risk needing assistance walking in common areas. The failure to give assistance when the records and evidence show same is necessary constitutes a breach of care in a negligence suit.

Falls are only one area of concern. There are elopement issues when a resident is allowed to leave the facility alone and is struck by a care, left out in the cold etc..Also, there are those cases where the resident is vulnerable to abuse by other patients.

In summary, although more difficult than a nursing home case, these cases are worth pursuing.

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