

Unlawful Trade Practices, Investigations, and Claims: Are Long Term Care Providers at Risk?

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Though the statutory names vary from state to state,¹ certain laws exist in every state for the same general reason—to protect consumers from fraud and unfair or deceptive business practices.² Known generally as unfair or unlawful trade practice laws and acts, they codify, in particular, the states’ public policies of protecting particularly vulnerable consumers.³ Even though the long term care industry is regulated by state and federal laws, unlawful trade practice laws can still apply to long term care providers. Not surprisingly, for long term care providers, who generally provide services to individuals who may be elderly or suffer cognitive deficits, the implication of unfair trade practice laws is significant.

Unfair trade practice laws are generally enforced by state attorneys general (AGs).⁴ However, individuals who claim to have been damaged by deceptive practices that violate the law,⁵ or entire classes of similarly situated individuals,⁶ usually also have standing to bring unfair trade practice claims.

Prohibited Conduct and Remedies for Committing Unfair Trade Practices

Unfair trade practice statutes proscribe a wide variety of conduct, ranging from representing “that real estate, goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, quantities or qualities that the real estate, goods or services do not have,”⁷ to using “unfair or deceptive acts or practices in the conduct of any trade or commerce,”⁸ to engaging in “any other conduct which similarly creates a likelihood of confusion or of misunderstanding.”⁹

State unlawful trade practice actions against long term care providers can be especially problematic. Remedies for violation of these laws can be substantial. Such remedies may include declaratory judgments that specific actions violate the law,¹⁰ injunctions to prevent certain actions,¹¹ civil penalties,¹² awards of economic damages,¹³ awards of punitive damages,¹⁴ awards of attorneys’ fees, and additional remedies as may be deemed appropriate by the court to “restore to any person in interest any moneys or property, real or personal, of which the person was deprived by means of any practice declared to be unlawful.”¹⁵ Moreover, responding to unfair trade practice investigations, or defending against such claims, can impose other hardships on long term care providers, such as disruption of business, heightened scrutiny from licensing authorities (including imposition of license conditions), negative impacts on management and staff morale, and negative (and potentially one-sided and inaccurate) public relations fallout.

Civil Investigative Demands and Unfair Trade Practice Investigations

Generally, state laws empower state AGs to issue Civil Investigative Demands (CIDs) to investigate potential unlawful trade practices.¹⁶ CIDs are broad statutory discovery tools that require those served with such demands to provide requested information, including documents, written responses to interrogatories, and testimony. In effect, CIDs are administrative subpoenas.¹⁷ The factual threshold for issuance of a CID is generally low, meaning that state AGs may, for example, need to only show that they believe issuance of a CID is in the public interest¹⁸ or that the subject of the CID possesses information relevant to the investigation.¹⁹ CID statutes generally also provide mechanisms to challenge CIDs, such as by filing a petition to modify or set aside the CID.²⁰ However, given the broad powers CID statutes bestow, such challenges can seem like, and are often, an exercise in futility.²¹

How does this affect long term care providers? What if, for example, the Internet sites of those providers state that they provide “gourmet quality, nutritious meals and snacks to residents,” and their residents complain to their states’ offices of consumer affairs that the facilities’ meals are unappetizing and not nutritious? Or what if a provider advertises in its marketing materials that it has “highly qualified, professional trained staff,” and it only provides personal caregivers? It is possible that the AGs could decide to exercise their broad CID powers to investigate such resident complaints. In such a scenario, the facilities should expect that the AGs would look closely at the facilities’ Internet sites, brochures, and other forms of advertising, as well as admission agreements, resident handbooks, policies, staffing numbers, service plans, and uniform disclosure statements. The facilities also should expect investigators to interview residents, residents’ families, facility staff, and state regulators. If witnesses then complain about other “misrepresentations,” the investigation might substantially increase in scope, and what was initially perceived as a small problem with a few purportedly unappetizing meals could become quite large, time consuming, and expensive.

State Lawsuit to Enforce Unfair Trade Practice Against Long Term Care Providers

In a recent matter involving such state enforcement, the Texas Office of the Attorney General filed a lawsuit against the operator of an assisted living facility.²² In that case, a resident who suffered from dementia and who had a “history of exit-seeking behaviors,” was left unsupervised, left the facility, and was found dead in a nearby field several days later.²³ The state claimed, among other things, that the facility operator violated the state’s unfair trade practices act.²⁴ The state alleged that the facility operator had misrepresented the services being offered at the facility.²⁵ Further, because the “unlawful acts and practices” caused damage adversely affecting the lawful conduct of trade and commerce, the state AG “determined that these proceedings are in the public interest.”²⁶ The state also alleged that the facility operator’s “acts and omissions failed to comply with representations made on its website that its facilities provided trained staff and monitoring twenty-four hours each day. . . and advertised ‘specialized units for residents with Alzheimer’s or dementia’. . . and misrepresented its services insofar as its policies and procedures protected residents from neglect.”²⁷ The facility operator moved to dismiss the case on the grounds that it constituted a health care liability claim under the state’s medical liability act and that the state had failed to submit a requisite expert report.²⁸ The trial court granted the motion and dismissed the lawsuit.²⁹ On appeal, the court of appeals reversed this decision and remanded the case to the trial court, reasoning that, while the state’s medical liability act was designed to address “crises affecting medical and health care and medical malpractice insurance,” by contrast, the purpose of the unfair trade practices act is to promote the fundamental goal of protecting consumers.³⁰

Preemption as a Defense Against Unfair Trade Practice Claims

Notwithstanding the above decision, in some cases, a long term care facility may be able to successfully argue that unfair trade practice claims made against it are preempted by other statutes.³¹ In one such case involving a private unfair trade practice action, the personal representative of a deceased resident sued the resident’s long term care facility for, among other things, violation of the Oklahoma Consumer Protection Act.³² In that case, the personal representative claimed that the resident died as the result of the facility’s negligent acts, conduct, and omissions to act.³³ With respect to the unfair trade practice claim, the personal representative alleged that the facility had solicited the resident with “false, fraudulent and misleading representations and/or assurances and/or promises which are contrary to and in violation of Oklahoma’s Consumer Protection Act” and by misrepresenting “the degree and standard of care and treatment that . . . would be provided to [the resident].”³⁴ The facility moved to dismiss the unfair trade practice claim on the grounds that regulation of nursing homes does not fall under the scope of the Oklahoma Consumer Protection Act and, instead, falls within a statutory exemption for “actions or transactions regulated under laws administered by the Corporation Commission or any other regulatory body or officer acting under statutory authority of this state or the United States.”³⁵

The Oklahoma Supreme Court, noting that the exemption expressly applies to “actions or transactions” that are regulated under laws administered by any regulatory body acting under the statutory authority of Oklahoma, explained that Oklahoma’s Nursing Home Care Act³⁶ applied to the “action or transaction” at issue—namely, the services and level of care alleged to have been wrongfully represented to the resident:

The Nursing Home Care Act is a statutory scheme that sets out the duties of the Department of Health, regulation of the nursing home industry, the services to be provided residents, and it provides remedies and penalties for breaches of the Act. We find that the plaintiff’s claim under the Consumer Protection Act must fail because the provision of care and medical services by nursing homes is regulated under laws administered by the Oklahoma Department of Health under the Nursing Home Care Act, and as such falls within the exemption to the Consumer Protection Act. . .³⁷

Accordingly, the court dismissed the Oklahoma Consumer Protection Act claim, holding that the claim was preempted by Oklahoma’s Nursing Home Act.³⁸

On the other hand, where claims are based on the commercial aspects of long term care facilities i.e., payment of services, courts may be more likely to find that unfair trade practice law applies. In a Connecticut case, a long term care facility filed a lawsuit against the son of a resident at the facility to collect more than \$35,000 in unpaid fees for services it provided to the resident.³⁹ When the resident was admitted to the facility, her son, who was the resident’s power of attorney, “signed the Resident Admission Agreement on the line marked ‘Responsible Party.’”⁴⁰ The facility claimed that the son had breached the requirement under the admission agreement that directed him to take all steps necessary to promptly qualify the resident for Medicare and Medicaid benefits, which breach caused the facility to suffer monetary damages.⁴¹ In response, the resident’s son filed counterclaims that included an allegation that the facility violated the

Connecticut Unfair Trade Practices Act (CUTPA) by forcing him to sign the “preprinted” admission agreement but never sending him a copy, explaining what “Responsible Party” meant, or giving him an opportunity to read the contract before signing it.⁴² The son claimed that, instead, the facility’s admissions director merely told him where to sign, causing him to believe he was signing the contract as the resident’s power of attorney for the sole purpose of being able to participate in medical decisions.⁴³ The facility filed a motion for summary judgment against the son’s CUTPA counterclaim, arguing that CUTPA did not apply because, among other things, the collection of fees for its services was incidental to its primary business of providing health care services to its elderly residents.⁴⁴ The court denied the facility’s motion.⁴⁵ In so doing, the court reasoned that, because the facility’s complaint dealt with the commercial aspect of the services it provided to the resident, namely payment for those services, the son’s CUTPA counterclaim against the facility was viable, and that a jury would need to decide fact questions, such as whether the manner in which the admission agreement was executed constituted immoral, unethical, oppressive, or unscrupulous conduct by the facility.⁴⁶

Assessing the Risk

There is good news. Long term care facilities can take proactive steps to help reduce the risk that they will become the target of unfair trade practice investigations and claims, and to improve their chances of successfully defending against such investigations and claims.

Admission agreements are one place to start. Facilities should take a hard look at their admission agreements to make sure that they clearly and plainly explain to facility residents, and those making decisions on behalf of residents, what the parties’ rights and duties are under the agreement— and whom to ask for help and clarification if the residents or their decision makers have any questions. The agreements should explain to individuals who sign the agreements in

what capacity they are signing the agreement: as the resident's power of attorney, conservator, guardian, or responsible party. Those designations also should be clearly defined in the agreement.

Internet sites, brochures, forms of advertisement, resident handbooks, policies and procedures, and the facility's uniform disclosure statement are another area to review to ensure they do not contain misrepresentations about the level of care and the services offered and provided. Could these documents be construed as inaccurate or misleading? Did the facility overstate or overpromise its services? Moreover, because laws that regulate long term care providers—and interpretations of those laws—can change over time, this sort of comprehensive review of facility agreements, policies, and general representations should be reassessed at least annually, so that those materials can be amended, if necessary, to ensure that they are up to date and accurate.

Another strategy to reduce the risk of unfair trade practice investigations and claims is to continuously seek, and respond to, feedback and suggestions from facility residents and their families, as well as facility staff. Make sure to contemporaneously document suggestions and feedback, along with the facility's actions responding to any reported concerns or deficiencies. It is much easier to respond to residents' concerns as they are made—before they are reported to the state to decide whether they constitute unfair trade practices. Moreover, even if a complaint to the state is made, showing that the facility has already taken prompt and appropriate steps to correct the concern can be useful in responding to an unfair trade practice investigation or complaint. It also is important to promptly seek the advice of counsel if you are the target of an unfair trade practices investigation. This should help reduce the incidence of making problematic admissions to the state AG, as these investigations often can lead to highly contentious litigation.

Conclusion

Unfair trade practices laws were enacted to protect consumers in general and vulnerable consumers in particular. These laws can apply to long term care facilities, and care should be taken to avoid the foreseeable pitfalls of violations of these laws. Because of the inherently vulnerable nature of the residents at long term care facilities, long term care providers need to be particularly vigilant to ensure that they do not engage in any conduct that could be construed as deceptive or unfair. Be proactive today to reduce risk for tomorrow. The alternative is increased risk of investigations, claims, and potential liability, and those who violate unfair trade practices laws can face substantial negative consequences, both from a reputation and monetary perspective.

¹ See, e.g., Alabama's Deceptive Trade Practices Act (Ala. Code §§ 8-19-1 to -15 (2015)); Idaho Consumer Protection Act (Idaho Code Ann. §§ 48-601 to -619 (2015)); Indiana's Deceptive Consumer Sales Act (Ind. Code §§ 24-5-0.5-0.1 to -12 (2015)); and Oregon's Unlawful Trade Practices Law (Or. Rev. Stat. §§ 646.605–.656 (2015)).

² See, e.g., *In re Derienzo*, 254 B.R. 334, 343 (Bankr. M.D. Pa. 2000) (the purpose of Pennsylvania's Unfair Trade Practices and Consumer Protection Law is to protect the public from fraud and unfair or deceptive business practices); *Allstate Ins. Co. v. Bogoraz*, 818 F. Supp. 2d 544 (E.D.N.Y. 2011) (a purpose of New York's unfair trade practices law, N.Y. Exec. Law § 63, is to protect an honest market place where trust prevails between buyer and seller); *Think Vacuums, Inc. v. March*, Case No. 09-61883-CIV, 2011 WL 579201, at *1 (S.D. Fla. Feb. 9, 2011) (quoting Fla. Stat. § 501.202(2) (2015)) (the purpose of Florida's Deceptive and Unfair Trade Practices Act is “[t]o protect the consuming public and legitimate business enterprises from those who engage in unfair methods of competition, or unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce”).

³ See, e.g., *Rubino v. Circuit City Stores, Inc.*, 324 Ill. App. 3d 931, 953, 758 N.E.2d 1, 17 (2001), as modified on denial of reh'g (Sept. 21, 2001) (“Consumer protection legislation exists to protect vulnerable consumers against unfair and deceptive practices, particularly in regard to credit and other financial transactions. . .”).

⁴ For example, the Florida Deceptive and Unfair Trade Practices Act provides that “if a violation . . . occurs in or affects the judicial circuit under the office's jurisdiction,” the enforcing authority is the office of the state's Attorney General. Fla. Stat. § 501.203(2) (2015). “[I]f the violation occurs in or affects more than one judicial circuit or if the office of the state attorney defers to the [Department of Legal Affairs] in writing, or fails to act upon a violation within 90 days after a written complaint has been filed with the state attorney,” then enforcing

authority falls to the Department of Legal Affairs. Id.; see, also, Nev. Rev. Stat. § 598A.070(1) (2015); R.I. Gen. Laws § 6-13-6 (2015).

⁵ Kan. Stat. Ann. § 50-634 (2015).

⁶ Conn. Gen. Stat. § 42-110g(b) (2015); see also GGNSC Arkadelphia, LLC v. Lamb ex rel. Williams, 2015 Ark. 253, 465 S.W.3d 826 (2015), reh'g denied (July 23, 2015) (affirming the trial court's certification of class in class action against 12 Arkansas nursing home facilities in which the plaintiffs alleged, among other things, that the facilities violated the Arkansas Deceptive Trade Practices Act by allegedly chronically understaffing the nursing homes in breach of the facilities' standard admission agreement and resident's rights law).

⁷ Or. Rev. Stat. § 646.608(e) (2015).

⁸ Wash. Rev. Code § 19.86.020 (2015).

⁹ Del. Code tit. 6, §2532(a)(12) (2015).

¹⁰ Mich. Comp. Laws § 445.911(1)(a) (2015).

¹¹ S.C. Code Ann. § 35-5-38(D) (2015).

¹² Miss. Code. Ann. 75-24-19(1) (2015).

¹³ Tex. Bus. & Com. Code Ann. § 17.45(11) (2015).

¹⁴ Conn. Gen. Stat. § 42-110g(a) (2015).

¹⁵ Or. Rev. Stat. § 646.636 (2015).

¹⁶ See, e.g., Little v. State of Oregon ex rel. Dep't of Justice, 130 Or. App. 668, 883 P.2d 272, 274 (1994) (approving the Department of Justice's service of CID while investigating alleged violations of the state's Unlawful Trade Practices Act).

¹⁷ Brixen & Christopher Architects v. State, 29 P.3d 650, 664 (Utah Ct. App. 2001) (Davis, J., dissenting) ("CIDs are a method by which the attorney general may compel an individual or corporation to provide 'information relevant to a civil antitrust investigation.' . . . Thus, CIDs are essentially administrative subpoenas issued by the attorney general").

¹⁸ S.C. Code Ann. § 39-5-70 (2015).

¹⁹ Wash. Rev. Code § 19.86.110 (2015); Ohio Rev. Code § 1331.16(B) (2015).

²⁰ Or. Rev. Stat. § 646.618(2) (2013); Mass Gen Laws ch. 93, § 8 (2015). 21 See, e.g., Vendall Mktg. Corp. v. State Dep't of Justice, 318 Or. 189, 195, 863 P.2d 1263, 1266 (1993) (A CID proceeding is not an appropriate forum in which a CID recipient should argue that an unlawful trade practices act does apply to it, as the only relevant issue at the CID stage is whether the state's Department of Justice had the statutory authority to issue the CID).

²² State v. Emeritus Corp., 466 S.W.3d 233 (Tex. App. 2015), petition for review filed (May 11, 2015).

²³ Id. at 237.

²⁴ Id. at 238.

²⁵ Id.

²⁶ Id.

²⁷ Id. at 239.

²⁸ Id.

²⁹ Id. at 240.

³⁰ Id. at 249.

³¹ But, still, some long term care regulations grant an express right of action under unfair trade practice acts to long term care facility residents. See, e.g., 940 Mass. Code Regs. 4.02–4.09 (1987), each of which begins, "It shall be an unfair or deceptive act or practice, in violation of M.G.L. c. 93A, § 2, for a licensee or an administrator" of a nursing home or other long-term care facility to do or fail to do certain acts, such as "to fail to comply with any existing state or federal statute, rule or regulation which provides protection to or for residents or prospective residents of long-term care facilities." 940 Mass. Code Regs. 4.02(1) (1987).

³² Estate of Hicks v. Urban East, Inc., 92 P.3d 88 (Ok Sup Ct 2004). 33 Id. at 89.

³⁴ Id. at 93.

³⁵ Okla.Stat. tit. 15, § 754(2) (2015).

³⁶ Okla.Stat. tit. 63, § 1-1901 (2015).

³⁷ Estate of Hicks v. Urban East, 2004 OK 36, 92 P.3d 88, Case No. 99432 (2004).

³⁸ See also Brogdon ex rel. Cline v. Nat'l Healthcare Corp., 103 F. Supp. 2d 1322, 1336 (N.D. Ga. 2000) (holding that residents' claims against a long term care facility under Georgia's Fair Business Practices Act (FBPA), in which residents claimed, among other things, that the facilities were understaffed and served food lacking nutritional value, must be dismissed because "the degree of care provided to [residents] is

regulated by state and federal agencies” and the Georgia Court of Appeals had previously observed that the “General Assembly intended the FBPA to have a ‘restricted application only to the unregulated consumer marketplace’”).

³⁹ Haven Health Center of Litchfield Hills, LLC v. Parente, 2007 WL 123602 (unpublished 2007).

⁴⁰ Id. at 1.

⁴¹ Id.

⁴² Id. at 2–3.

⁴³ Id. at 3.

⁴⁴ Id. at 2.

⁴⁵ Id. at 3–4.

⁴⁶ See also Chalfin v. Beverly Enterprises, Inc., 741 F. Supp. 1162, 1176-77 (E.D. Pa. 1989) (holding that the resident had adequately stated a claim against the nursing home under Pennsylvania’s Unfair Trade Practices and Consumer Protection Law by alleging the nursing home “never intended, as the [admission] agreement provided, to assist its patients in securing medical assistance and instead intended to replace those patients who sought Medicaid with private care patients”).



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