

LONG TERM CARE AND SENIOR HOUSING INDUSTRY IS ON PLAINTIFF ATTORNEYS' RADAR SCREEN

Fall/Winter 2004-2005



By
Warren E. Babb, Jr.

It's coming. As sure as the ocean waves crash steadily on the shoreline, new and larger waves of long term care and senior housing litigation are making their way across the country. The beachheads have been established in the courts of Florida, Texas and Mississippi over the last few years. However, this litigation is now squarely on the radar screens of thousands of plaintiff attorneys nationwide. The Northwest is not immune from these recent trends. Over the past two years the number of long term care/senior housing claims/lawsuits in Washington and Oregon has significantly increased. The following briefly summarizes the factors behind these trends, the litigation strategies employed by plaintiffs' counsel, and measures long term care/senior housing operators can take to avoid being swamped by the rising tides of litigation.

The Aging of America

As the well-known baby boom bulge in the population demographic makes its way up the aging ladder, Americans have become increasingly sensitive to age and age-related issues. Baby boomers dealing with the aging issues, not only of their parents but of themselves. These baby boomers and the elderly themselves comprise a significant percentage of jury pools across the country and here in the Northwest. Both groups are growing increasingly distrustful of Corporate America.

More Information is Readily Available to the Public

As our population ages and technology has advanced, more and more information has become readily available to the public, which includes the plaintiffs' bar, regarding the operation, regulation and oversight of senior housing and long term care facilities. Websites such as the Centers for Medicare and Medicaid Services (CMS) and Nursing Home Compare provide detailed explanation of past and future regulations, and discuss ongoing issues relating to the operation and regulation of such facilities. Through these and similar sites individuals can also gain access to information about specific companies and facilities. They can see how specific facilities have performed in various audits and surveys.

Increased Legislation/Regulation

Our increased societal sensitivity to aging has resulted in increased legislation designed to protect the rights of the elderly. One such piece of legislation, the Vulnerable Adult Statute, drives up the value of claims against long term care and senior housing facilities. The Statute increases the number of theories on which a prospective plaintiff may base a claim. It also provides for a full recovery of actual litigation costs in the event the claimant prevails. The overall spike in legislative activity has also spawned new and more detailed regulations, that apply not only to skilled nursing facilities (SNFs), but also to assisted living facilities (ALFs). It is a long accepted truism that increased regulation breeds increased litigation, and this area of the law is no exception.

A Perfect Storm for Plaintiff's Attorneys

The confluence of the population demographics and increased legislative and regulatory activity has brought about the "perfect storm" for plaintiffs' attorneys to target elder care health and service providers. Upper echelon plaintiffs' injury firms see significant financial rewards in this arena. Indeed, verdict and settlement trends suggest that elder injury cases that in the past rarely rose above five figures, are now commonly settled for mid-six figures, seven figures, or in some extreme cases eight figures. The more prominent plaintiffs' attorneys' entry into this arena has changed the dynamic of elder care litigation. These firms have the talent, resources and networks to put extensive time and effort into prosecuting an elder care case.

The Plaintiffs' Bar is Taking Note

One of the natural consequences flowing from the demographic and legislative factors is that over the past two years both national and state plaintiff attorneys' bar associations have put on seminars instructing their members on how to prepare and conduct long term care/senior housing litigation. The Washington State Trial Lawyers Association (WSTLA) has put on several of these seminars over the past two years. The October 2004 issue of the

WSTLA newsletter devoted numerous pages, entitled “Special Focus: Elder Law/Abuse,” to the tactics and strategies involved in successfully bringing suit against long term care/senior housing providers and the significant rewards that flow therefrom.

The newsletter emphasizes the aging demographic of our population, pointing out that the number of Americans who will be age 65 over in the next two decades will increase by 34%. The 85 year-old plus population will increase from 4.2 million in 2000 to 8.9 million by the year 2030. The article references a recent report by the Health Care Finance Administration (HCFA) to Congress. That report included findings that U.S. nursing homes staff at levels below other countries; over 92% of U.S. nursing homes fall below recommended standards; and nearly 50% of nursing homes need to increase their certified nurse aide staffing by 50% or more to meet “minimal requirements.”

The article also discusses in great detail the Vulnerable Adult Statute (RCW 74.34), 42 CFR 483 and WAC 388-97, as well as other regulation of the senior housing and nursing home industry. It provides an explanatory road map for attorneys interested in bringing suit against long term care/senior housing providers. The authors specifically cite the Washington State Supreme Court’s pronouncement in *Niece v. Elmview Group Home* that group homes, nursing homes and similar facilities have a special protective relationship with their residents that imposes a higher standard of care.

The Defense Bar Reacts

The defense bar is aware of this trend and has been monitoring it. The Defense Research Institute (DRI) now has a sub-committee on nursing home litigation. This committee held a seminar in Boston in September 2004. Over 600 industry members and defense lawyers attended. Emerging patterns in plaintiffs’ lawsuits and strategies were discussed, as well as potential defense strategies to minimize the liability exposure of the elder care providers. Many state bar associations are holding similar seminars. Some states have seen initiative activity attempting to limit the amount of damages that can be collected in elder care litigation.

The Typical Nursing Home/Elder Care Lawsuit

Although the text of the complaint in each lawsuit can vary, there is a distinct pattern to the allegations contained in the (non-physical/sexual assault) elder care/housing lawsuit. These complaints will contain some or all of the following theories and allegations:

1. General/common law negligence;
2. Negligence/violations of federal law including 42 CFR Part 483;
3. Violation of the Vulnerable Adult Statute (RCW 74.34);
4. Failure to adopt and implement a reasonable comprehensive care plan (WAC 388-97);

5. Failure to meet minimum statutory standards for elder care (RCW 70.129);
6. General medical negligence (RCW 7.70);
7. Lack of informed consent;
8. Corporate negligence/punitive damages;
9. Respondeat superior – liability for acts of employees and managers;
10. Misrepresentation; and
11. Consumer Protection Act.

Steps Providers Can Take to Reduce Exposure

As in other areas of litigation, there are steps long term care/senior housing providers can take to reduce or minimize their risk, particularly in a high exposure claim. These steps can be taken both prophylactically, in the form of modified business practices, and post-lawsuit, in the form of a proactive and informed response to a specific claim.

An Ounce of Prevention . . .

. . . is worth a pound of cure. This age-old adage has direct applicability in the long term care and senior housing setting. Providers can significantly reduce their litigation exposure by ensuring that their procedure and training manuals are current and updated, and all employee training is documented and available to be produced in the event of litigation. This is particularly true of training regarding fall protection programs and wound care education/protocol.

It is also vitally important that all input, observations and notes regarding resident care, resident interaction and employee personnel issues be documented in a fashion that expedites retrieval and review should an issue later arise. The single biggest problem that defense attorneys have in responding to senior housing/nursing home claims is a lack of coherent documentation regarding a resident’s stay and/or the employees who interacted with that resident. Maintaining this valuable documentation will significantly improve a provider’s chances of successfully defending a subsequent claim.

Many facilities have developed “reality based” orientation videos that are shown to the resident and/or the resident’s family upon admission. Such videos are designed to make sure the residents and their families do not enter the facility with unrealistic expectations that may later fuel a lawsuit. Similarly, the facilities’ brochures and other marketing materials must be tempered to reduce these risks.

Finally, it is advisable and strongly encouraged that a provider conduct and document an exit interview with a departing employee. If the employee is terminated and/or refuses to participate in such an interview, that should be documented. Disgruntled former employees frequently serve as “insider” witnesses for plaintiffs.

The Best Defense is a Good Offense

Once a claim is made or a lawsuit filed, it is extremely important for the long term care/senior housing provider and its attorney to gather as much information as quickly as possible and to conduct a thorough and efficient investigation. This includes having the attorney visit and spend time at the facility involved. That attorney should interview management personnel as well as other key witnesses.

Defense counsel should identify and spend significant time with individuals that will likely be the primary fact witnesses. It is critical that each such witness be properly prepared for his/her deposition. Skillful plaintiff's counsel can elicit very damaging admissions from the unprepared employee witness. Potential witnesses who have left the provider's employment should be identified and interviewed. In some cases signed declarations may be obtained to "nail down" a witnesses' testimony on a particular issue.

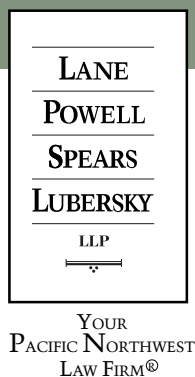
Detailed written discovery requests should be sent to plaintiff's attorney early on. Such discovery should be designed to elicit the plaintiffs case themes and legal theories, as well identify those individuals who have knowledge of facts that allegedly support plaintiff's claims.

Defense counsel and the provider should also develop a list of potential experts and get them involved early in the case. Case themes should be developed early on in the defense process. These themes should put forward the provider's theory of the case, not simply seek to negate plaintiff's themes or theory. They should be positive and emphasize the many services that are provided, and the dedication of the skilled professionals providing them. It is extremely important for the defense to be proactive rather than reactive.

Summary

In the end, there is no denying that the waves of newly filed elder care claims will continue to come. We have been able to see patterns in the litigation brought by plaintiffs' counsel in these cases. Providers need to use these patterns and their own business resources to survive the turbulence that this type of litigation can cause their business and personal relationships.

Warren Babb, Jr. is a partner in the Seattle office of Lane Powell Spears Lubersky LLP. Warren's trial practice includes extensive experience defending claims against Health and Long Term Care Professionals. He can be reached at 206.223.7089 or at babbw@lanepowell.com



Offices

Seattle

U.S. Bank Centre
1420 Fifth Avenue
Suite 4100
Seattle, WA 98101 - 2338
206.223.7000

Portland

ODS Tower
601 SW Second Avenue
Suite 2100
Portland, OR 97204 - 3158
503.778.2100

Anchorage

301 West Northern Lights Boulevard
Suite 301
Anchorage, AK 99503 - 2648
907.277.9511

Olympia

Market Centre Building
111 Market Street NE
Suite 360
Olympia, WA 98501
360.754.6001

London

Mitre House, 12 - 14 Mitre Street
London EC3A 5BU, England
011.44.20.7621.9054

www.lanepowell.com

© 2004 Lane Powell Spears Lubersky LLP