

Leading Age 2019 Fall Conference
**Protecting Your Organization
From Litigation Possibilities**

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Plaintiff Attorney's Theories of Liability

- **Common Law Negligence**
 - WI's Regulatory and Enforcement Environment
 - Caps on Damages and QA
- **Violations of the Consumer Protection Act**
 - Marketing Materials
 - DATCP – Attorney Fees and Insurance
- **Adult Protection Act**
- **Breach of Contract**
 - Admission Agreements
 - "Sole negligence" and Recovery of Attorney Fees Problematic
- **Negligent Hiring and/or Retention**
- **Wrongful Death**
- **Punitive Damages**
 - Insurance Coverage – Silent, Excluded or Sublimited
- **Americans with Disability Act/Fair Housing Act**

Arbitration Agreements

- **CMS has recently changed course and now permits the inclusion of arbitration clauses in admission agreements for skilled nursing facilities**
- **Requirements:**
 - May not be a condition of admission
 - Must explain the agreement in language the resident/representative understands; and
 - Ensure the agreement is entered voluntarily and that both the resident and facility agree on the arbitrator

Arbitration Agreements –
Risk Management Perspective

- On average, assisted living claims cost more than skilled.
- Claim frequency has been on the rise, but more alarming is the increase in indemnity (double digits)!
- Resident falls are 49.4% of claims filed, and the average paid is \$224,300.
- Pressure ulcers second leading cause of loss, followed by Improper Care (excluding falls).

Arbitration Agreements –
Risk Management Perspective

- Arbitration agreements reduce the frequency, severity and expense of professional liability claims.
- Decrease the amount of time the claim is open.
- Changes settlement behavior.
- Challenged arbitration agreements can be more expensive – more than 50% are not enforced due to improper execution.

Assisted Living Personal Injury Litigation

- Common Law Negligence
- Violations of state consumer protection act
- Breach of contract
- Negligent hiring/retention
- Wrongful death
- Punitive damages

Arbitration Agreements – Execution Considerations

- POA – don't just take the person's word. READ the agreement. Does it require something to happen before activated? Successor POA or Alternate POA?
- Court Appointed Guardian – what authority has the court given? If just financial, then it is not effective. Look for broad authority such as "to enter into contracts."
- Make sure both resident and rep get a copy and keep one signed for the file.
- Consider reading some parts of arbitration agreement – and execute consistently.

Government Enforcement Litigation

- **Fair Housing Act:** prohibits discrimination by direct providers of housing, such as landlords and real estate companies as well as other entities, whose discriminatory practices make housing unavailable to persons because of:
 - race or color
 - religion
 - sex
 - national origin
 - familial status, or
 - disability

Government Enforcement Litigation

- Fair Housing Act:
- **Disability:** those individuals with mental or physical impairments that substantially limit one or more major life activities.
- **Mental or physical impairment:** includes conditions such as blindness, hearing impairment, mobility impairment, HIV infection, mental retardation, alcoholism, drug addiction, chronic fatigue, learning disability, head injury, and mental illness.
- **Major life activity:** includes seeing, hearing, walking, breathing, performing manual tasks, caring for one's self, learning, speaking, or working.

Government Enforcement Litigation

- **Resurrection Retirement Community (2015)**
 - Discouraged applicants with disabilities, including potential tenants who used wheelchairs
 - Required prospective tenants to submit to a medical assessment
 - \$200,000 settlement fund for compensating aggrieved persons
 - \$20,000 civil penalty
 - Injunctive relief including adopting policies for marketing and showing rental units, publicize the new policies, record keeping requirements

Government Enforcement Litigation

- **Fort Norfolk Retirement Community**
 - Prohibited assisted living and nursing home residents from using the IL dining room
 - Prohibited assisted living and nursing home residents from attending events at IL
 - Had a written policy requiring residents who use motorized mobility aids to pay a \$300 non-refundable deposit and purchase liability insurance
 - \$350,000 settlement fund to pay aggrieved parties
 - \$40,000 civil monetary penalty
 - Injunctive relief: Non-discrimination policies; educational programs; compliance officer

Independent Living, Risk Management and Regulatory Issues

- DQA is getting increase in complaints – confusion as to AL or independent
- Increase in “professional liability” claims for independent living
- **Leasing/admission issues:**
 - “Capable of living independently”
 - “Admission records”
 - Providing services defined in DHS 89 or DHS 83 .

Government Enforcement Litigation

- **Americans with Disabilities Act**
 - Title III applies to "public accommodations"
 - Includes "senior citizen centers"
 - "Businesses that are generally open to the public and that fall into one of 12 categories listed in the ADA"
 - Prohibits public accommodations from discriminating against people with disabilities
 - Requires the facilities of and services offered by public accommodations to be accessible by individuals with disabilities

Government Enforcement Litigation

- **Brookdale**
 - Class action alleging that Brookdale's assisted living communities are public accommodations
 - Contended that Brookdale discriminated against people with disabilities by not providing sufficient staffing
 - The trial court found that Brookdale was a public accommodation
 - No ruling yet on the merit of the allegation that failing to provide staff was discrimination
 - Appeal pending

Government Enforcement Litigation

- **False Claims Act**
 - Prohibits the submission of false or fraudulent claims to government health care programs
 - Claims must be submit with knowledge of their falsity but the definition of "knowledge is broad" and includes deliberate indifference and reckless disregard for the falsity of the claims
 - Treble damages plus a per false claim penalty

Government Enforcement Litigation

- **Brookdale (again)**
 - Sued by a whistleblower in federal court in Tennessee
 - Alleged that a subsidiary of Brookdale that provides home health services submitted false claims for home health services provided by its residents
 - The whistleblower alleged that Brookdale did not obtain physician certifications timely
 - The district dismissed the claims based on the theory that the certifications were not material to the government's payment decision
 - Reverse on appeal and sent back to the trial court for further proceedings

False Claims Act and Insurance

- Coverage can be found on D&O Policies
- Generally high deductible and/or co-insurance or low sublimit
- Some stand alone policies
- Regulatory fines and penalties for billing liability and false claims, claims expense, damages can be covered.

Government Enforcement Litigation

- **Failure of Care Theory under the FCA**
 - In order for liability to be imposed under the FCA, there must be some nexus to federal funding (which can include Medicaid)
 - Typically used against skilled nursing facilities
 - Submitting claims for reimbursement while providing inadequate care and, thus, failing to comply with the nursing home quality-of-care federal and state laws, alleged to constitute fraud on the government
 - Application to assisted living facilities largely untested

Questions?

- For additional information:

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