



Breach of Contract and Consumer Fraud Claims

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Long-term care (LTC) litigation centering around alleged deficiencies in resident care and treatment has spiked in recent years. These cases often focus on familiar resident care issues such as repeated falls, pressure ulcers, elopement, medication errors, and general allegations of neglect and abuse. While each case brings its own unique set of facts, personalities, and challenges, these suits have historically followed the negligence model familiar in medical malpractice suits against doctors and hospitals.

In a traditional negligence or "tort" case, a resident or his or her family must prove that the LTC facility owed the resident a duty, that the facility breached that duty by providing substandard care, and that this substandard care caused the resident to suffer injury or harm. For example, in an elopement case, a plaintiff might attempt to prove that an assisted living (AL) facility owed a duty to provide adequate supervision to a resident with Alzheimer's disease, that the facility failed to properly supervise the resident during meal time, and that this failure to supervise allowed the resident to wander out of the building where the resident became ill from exposure to the elements. In this example, the plaintiff's damages might be his or her out-of-pocket medical expenses and the pain and suffering experienced by the resident from the resulting injuries.

As LTC litigation has evolved, plaintiffs have begun asserting novel theories of liability as a means of enhancing their underlying negligence claims. These theories, including breach of contract and consumer fraud, offer plaintiffs some unique advantages over traditional negligence cases. However, they are met with fierce resistance by LTC facilities in their defense and have found varying degrees of success.

Breach of Contract

As a general rule, when a resident moves into a facility for LTC, either the resident or his or her personal representative signs an admission agreement. This agreement is a contract between the facility and resident, which spells out the responsibilities of the respective parties. Often, one of the facility's enumerated responsibilities is to ensure that the resident receives reasonable care. In its simplest terms, the facility makes a promise that it will do its best to care for its residents and to keep them functioning at as high a level as is possible given

their conditions and any acuties that may arise.

In 1974, a federal court in New York held that a resident could bring a suit alleging breach of contract when she did not receive the level of care promised in an admission contract with a "residential home."¹ This contract stated that the residential home would supply "all necessary medical services and the use of the home's infirmary." After several years at the home, the resident's condition diminished, but the facility's infirmary had closed. The residential home was required to pay the difference between the cost of staying at the residential home and the cost of the resident's stay at a skilled nursing facility, which was considerably more expensive. The court went even further

by holding that a "[c]ontract to provide for residential care in [a] home entered into by persons of declining years should receive a liberal construction in favor of elderly people."

More recently, an Alabama court held that a plaintiff could bring a breach of contract claim against a nursing home when a resident paid for "[l]inen, housekeeping and maintenance services to ensure a safe, clean

and comfortable environment" but instead allegedly was provided with unsafe and unsanitary conditions.² The court reasoned that the duty to maintain a safe environment was expressly stated in the contract. Thus, a failure to maintain a safe environment could be a breach of that contract. Of course, the plaintiff could also bring a tort claim alleging that the facility treated her in a negligent fashion.

In 2002, a Pennsylvania trial court held that a plaintiff could bring a suit alleging breach of contract when an admission agreement stated that it would provide the resident "with safe and reasonable care in a safe environment, as well as services which would help or attain or maintain the highest practicable, physical, mental and psychosocial well-being, in accordance with a written care plan."³ While this language may sound like a familiar recitation of state and federal regulations, the Court held that if the plaintiff could prove that the facility did not live up to this promise, it breached its contract with the resident. To prove a breach, the plaintiff need only establish that the facility acted negligently—the same evidentiary threshold required of her in the underlying tort claim.

Breach of Contract Vs Tort Claims

This raises the question that if a breach of contract

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claim raises the same issues as a tort claim, what benefit does a plaintiff derive from bringing both? First, if the resident is “private pay,” he or she may be able to recover the money paid for the services that allegedly were not performed adequately. This could equate to the entire amount that he or she paid for residency at the facility. In addition, the plaintiff may have more latitude to place the admission agreement before a jury at trial and argue, line by line, that the resident did not receive what he or she was promised. This tactic could make the plaintiff’s allegations of substandard care more compelling to on-the-fence jurors.

In addition, many states offer a longer statute of limitations for contract claims than negligence claims. Therefore, if a plaintiff misses the deadline for filing a negligence claim, he or she still has an avenue to recover some damages.

Violations of Consumer Fraud Protection Acts

In addition to breach of contract and tort claims, some states have enacted laws that potentially provide additional avenues of recovery for former residents of LTC facilities in certain circumstances. “We provide all the necessary care and supervision to meet the most important concerns of our residents: safety and comfort,” declares one seemingly reasonable advertisement for an AL facility. Returning to the above example, what happens if a resident of that facility elopes and is injured? Of course, the resident could file suit under a traditional negligence theory. The resident could possibly bring a breach of contract claim. The resident could also allege that this advertisement represents a violation of state consumer fraud laws.

Laws protecting consumers from fraudulent advertising and unfair trade practices have existed for many years. Traditionally, these laws were meant to protect consumers from false advertisements that were intended to mislead consumers into purchasing certain products. In many states, consumer fraud laws are attractive vehicles for litigation for a variety of reasons including the potential to recover treble damages (triple the amount of actual damages) as well as attorneys’ fees and costs.

In addition, consumer fraud laws, like breach of contract actions, usually allow longer statute of limitations periods. Because injured residents or their families sometimes delay in bringing a case to an attorney, in extreme circumstances, a consumer fraud action may be their only remedy.

Courts have routinely held that professionals such as attorneys, architects, accountants, and most importantly, physicians, are immune from consumer protection laws because of the nature of their practices. In addition, the conduct of these professionals when placing advertisements is governed by individual licensing boards and regulations. It is reasonable to argue that

most or all of these protections apply equally to nurses, administrators, and LTC facilities.

A lower court in Pennsylvania has adopted a novel approach to this issue.³ It held that LTC facilities are hybrid organizations that provide “medical” and “non-medical” services to residents. The court held that while the plaintiff could not maintain a consumer fraud action for medical services, the action could go forward with respect to allegations of consumer fraud regarding nonmedical services. In AL facilities where much of the care provided is not akin to “skilled nursing,” the impact of this distinction could be great.

What Must A Plaintiff Prove?

The question next turns to what a plaintiff must prove in order to prevail in a consumer fraud case. In these cases, an AL facility will first assert that absent an explicit written contract, there exists no guarantee or warranty that nursing or medical treatment will provide a cure or specific outcome for a patient. Similarly, when faced with these allegations, an AL facility will no doubt assert that its advertisements were meant as mere “puffery”; that is, they are statements offered to provide subjective assurances rather than concrete, objective promises.

Most likely, consumer fraud claims will turn on the specificity of the advertisements, the degree to which a resident or his or her family relied on the advertisements in choosing a facility, and the degree to which the care and treatment provided by the facility clearly violated the advertisements. In the competitive LTC industry, facilities cannot survive without admitting new residents. However, facilities would be wise to carefully consider the content of all advertisements and how those advertisements might be viewed by prospective residents and, possibly, potential jurors.

As the number of LTC lawsuits continues to increase, it can be expected that plaintiffs will continue to seek out novel theories of liability. Regardless, in the end, these cases will rise or fall based on the quality of care provided to residents by LTC facilities. ALC

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3. *Zaborowski v. Hospitality Care Center of Hermitage*, 60 Pa. D. & C.4th 474 (C.C.P. Mercer Cty. 2002).