



Health Law Section

The Mississippi Bar

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Message from the Chair

'TIS THE SEASON

It is the time of year that everyone is wrapped up in the hustle and bustle of the fast-paced holiday season. Many find that this time of year adds stressors to their lives while others may even experience depression during the holidays.

I recently saw a physician address these issues during the local Tupelo news broadcast. The physician offered advice on how people can cope with these additional stressors and at the same time help others who often struggle with emotional and financial issues at this time of year. The physician advised that if you are feeling stressed out, or a bit lost during the holiday season, performing an unsolicited act of kindness for another

person in need can help to relieve your stress while at the same time providing help to a person in need. The physician advised that the simple act of performing a good deed for someone else has just as much of a positive effect on the person performing the good deed as it does on the recipient of the act of kindness. Clearly the physician was describing a win-win situation whereby you feel better about yourself for having a positive impact on someone else's life who may be struggling during this holiday season.

We are blessed and privileged to practice this profession. Think about giving back during this holiday season to help others who are less fortunate. Remember that giving to others does not necessarily mean that



Jeffrey S. Moore, Chair

you have to give money or tangible gifts. You may also give of your time and talents by volunteering for charitable organizations such as local food pantries, soup kitchens, the Salvation Army or other similar charitable entities that offer programs for the less fortunate during this time of year. Remember the old adage...it is better to give than to receive.

Health Law Section CLE Teleseminar - Thursday, February 11, 2016

Legal Ethics in Healthcare Representations: Conducting Internal Compliance Investigations and Defending Government Investigations and Fraud Cases

Teleseminar is FREE to Section Members

The Health Law Section will host a teleseminar on Thursday, February 11, to address various scenarios which may arise while conducting internal compliance investigations and when defending a client in a government healthcare investigation or health care fraud case which implicate the rules of ethics governing relationships among lawyers, clients and non-clients. Co-Presenters are Jonell Beeler and Scott Newton, shareholders in the Jackson office of Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C. Beeler serves as co-leader of her firm's Health Care Government Investigations Group and its Health Care Regulatory Task Force. Newton is a former Assistant U. S. Attorney. They will also address the Mississippi Rules of Professional Conduct and recent case law developments relevant to identifying the client you represent, establishing and maintaining the attorney-client privilege, dealing with unrepresented persons, and entering into joint defense or common interest agreements.

To register, please download the [brochure](#).

Defending Consumer Protection Claims Asserted Against Nursing Facilities

by: *Casey C. Kannenberg, Fennemore Craig, P.C.*

A somewhat new tactic utilized by the plaintiffs' bar is to, in addition to asserting professional negligence and/or wrongful death actions against long-term or skilled nursing facilities, claim that the facility also violated provisions of the state's consumer protection act. This tactic is often an attempt to circumvent statutory damage caps designed to protect healthcare institutions and providers from run-away jury verdicts and control health care costs. For example, under Colorado's Health Care Availability Act, plaintiffs may not recover more than \$300,000 in non-economic damages in tort actions against a healthcare provider or institution. Colo. Rev. Stat. §§ 13-64-102, 13-64-302(1)(c). Thus, if a jury awards a verdict for a plaintiff for non-economic damages in excess of \$300,000, the court is required by statute to reduce that award to \$300,000.

A separate claim for violations of a state's consumer protection act is one way plaintiffs attempt to avoid the damage limitations imposed by the foregoing statute (or similar statutes). In many states, consumer protection acts prohibit a species of fraudulent conduct. For instance, such acts prevent businesses from representing that services are of a particular quality, standard, or grade if it knows that that they are of another. See Colo. Rev. Stat. § 6-1-105(1)(g); Miss. Code § 75-24-5(2)(g) (same). In order to prevail on such claims, plaintiffs typically must prove the following: (1) that the defendant engaged in an unfair or deceptive trade practice; (2) that the challenged practice occurred in the course of the defendant's business or occupation; (3) that it significantly impacted the public (as actual or potential consumers of the defendant's services); (4) that the plaintiff suffered an injury to a legally protected interest; and (5) that the deceptive practice cause the injury. Colo. Rev. State. § 6-1-105; *Hall v. Walter*, 968 P.2d 224, 235 (Colo. 1998).

Long-term or skilled nursing facilities often have websites, brochures, and/or marketing materials that advertise the facility as providing "excellent care," "quality care," or similar statements. Plaintiffs may argue that such statements fraudulently induced them to admit their loved ones as residents, when the facility knew in fact that it could not provide the advertised level of services (because, for example, they had been previously cited by the department of health for certain deficiencies, and therefore knew they could not provide such care).

Consumer protection statutes are attractive to plaintiffs because they often provide for treble damages, which will circumvent any statutory damages caps. See, e.g. Colo. Rev. Stat. § 6-1-113(2)(a)(III) (providing for treble damages if the plaintiff can prove bad faith by clear and convincing evidence). There are, however, several ways to defeat such claims in a dispositive motion.

As a threshold matter, it is important to convey to the judge that the action is one for malpractice, negligence and/or wrongful death, and the plaintiff's attempts to cast it as something else (e.g., a fraud claim) is clearly an effort to avoid damages limitations. That being established, a defendant may first argue that the claim fails as a matter of law because the plaintiff (in a wrongful death case only) lacks standing. Consumer protection statutes often limit standing to sue under the statute to those who are "actual or potential" consumers, or successor/assignee of the actual consumer, of the defendant's services. See, e.g., Colo. Rev. Stat. § 6-1-113(1)(a), (b). A plaintiff in such a case, typical a family member serving as a legal representative, was not the consumer of the defendant's services—rather, it was the decedent. At least some trial courts have acknowledged standing as a basis to dismiss a consumer protection act claim as a matter of law. See, e.g., *Cheasebro v. Peak Medical Corp. of Colorado, Inc.*, 02CV1619 (Arapahoe Cty. Co., July 28, 2004); *MacNeil Automotive Products Ltd. V. Cannon Automotive Ltd.*, 715 F. Supp. 2d 786, 792 (N.D. Ill., E. Div. 2010).

Second, defense counsel may argue that the alleged fraudulent representations are not actionable as a matter of law. Long-term care, and skilled nursing, facilities often make representations in their marketing materials (e.g., brochures, websites, etc.) regarding the level of services provided, including that the care and treatment is "high quality," "excellent," "the best," and similar statements. Many jurisdictions recognize the foregoing statements as non-actionable opinions or "puffery"—they are not promises, guarantees, or warranties as to the care that will be provided. See *Park Rise Homeowners Ass'n v. Resource Constr. Co.*, 155 P.3d 427, 435–36 (Colo. App. 2006); *Teitworth v. Harley-Davidson, Inc.*, 677 N.W.2d 233, 246 (Wis. 2004); *Barbara's Sales, Inc. v. Intel Corp.*, 879 N.E.2d 910, 926 (Ill. 2007). If such statements are at issue, a motion to dismiss or motion for summary judgment may be a great tool to defeat the claim prior to trial.

Last, defense counsel may argue that the plaintiff did not actually rely on any representations made by the defendant with respect to the quality of care promised or level of services provided. Consumer protection statutes typically require—similar to a fraud claim—that the plaintiff actually rely on the representations made by the defendant. Without such reliance, plaintiffs have no damages. In other words, whether or not the representations made by the defendant are

Defending Consumer Protection Claims Asserted Against Nursing Facilities, *continued*

actionable under the statute, if the plaintiff did not rely on those representations to his or her detriment in deciding to place a loved one at long-term care facility, there can be no recovery under the statute. It must be noted, however, that in order to prove lack of reliance, certain discovery must be had. In particular, the plaintiff must admit in response to a Request for Admission, or testify in a deposition, that there was no reliance. Documents or information provided in response to an interrogatory or request for production may also furnish the needed facts or evidence to accomplish the same end. Thus, a motion for summary judgment—rather than a motion to dismiss—is the proper vehicle to make the foregoing argument.

In sum, defense counsel representing long-term or nursing facilities in negligence, malpractice, or wrongful death actions, where the plaintiff has also brought claims for violation of a consumer protection statute, should first and foremost convince the judge that the case is solely about the care and treatment of the patient or resident at issue, and that the consumer protection claims are nothing more than the sideshow taking over the circus. In many cases, such claims are clearly attempts by plaintiffs' attorneys to circumvent statutory damages caps that limit the amount of damages recoverable by a plaintiff.

That being accomplished, depending upon the facts of the particular case, many of these claims can be dismissed as a matter of law before the case gets to the jury, such that the triable case is limited to the care and treatment of the patient or resident at issue. As discussed above, tools for challenging such claims in a dispositive motion include (but certainly are not limited to): (1) lack of standing; (2) non-actionable representations; and (3) no detrimental reliance. It must be observed, however, that there may be cases in which the foregoing arguments do not apply—for example, where the representations made by the facility rise above mere puffery (e.g., “we promise and guarantee that your loved one will achieve his or her maximum potential”), or where it is clear from the course of discovery that the plaintiff has standing and did in fact rely on the representations. Defense counsel must make determinations regarding the potential for dispositive relief case by case.

Casey Kannenberg focuses his practice in the areas business and civil litigation, health care litigation, medical negligence defense, and sports/entertainment law. An experienced litigator, Casey has represented businesses and other corporate constituents in complex, high-stakes business disputes, including those involving breach of contract, bad faith, controlling and minority shareholder interests, securities, primary and excess insurance coverage, intellectual property litigation, white-collar criminal defense (e.g., tax/securities fraud, RICO, and offenses under the Bank Secrecy Act), and a multitude of other legal issues that businesses and business professionals experience. In addition, Casey has unique experience representing sports-industry participants and entertainers, including representation in the NCAA compliance, investigation, and enforcement processes, and providing advice and legal guidance to athletes and entertainers.

Casey also defends health care professionals and institutions, including hospitals, long-term care facilities, physicians, and other licensed health care professionals both in litigation and actions before licensing agencies. In addition to his litigation experience, Casey is also heavily involved in his community and in bar association work, serving as the President/CEO of a non-profit corporation and as a senior leader in both the American and Colorado Bar Associations' Young Lawyers Divisions.

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We are on the
web!
Click [here](#)

Upcoming Events

Thursday, February 11, 2016
Health Law Section Ethics Teleseminar
"Legal Ethics in Healthcare Representations"
Free to Section members - [Register now](#)

Tuesday, May 3, 2016
Health Law Section 6 hour CLE
at the Mississippi Bar Center in Jackson.

Thursday, July 14, 2016
Health Law Section Annual Meeting
at the Sandestin Hilton.

Health Law Section 2015-2016 Executive Committee

Write for the Health Law Section Newsletter

The Health Law Section newsletter is now accepting articles on health law topics for publication in the newsletter. If you have an idea for an article, you may submit it to Health Law Section Newsletter Editor Blake Adams at blake.adams@phelps.com.

Please include a short description of the article. The Health Law Section Committee will consider your proposal and will notify you of whether your proposal has been accepted. The committee reserves the right to reject proposals. Please note that when you submit your article for publication in the newsletter, you will be granting The Mississippi Bar the nonexclusive right to publish your article.

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