When Does a Citation Become a Misrepresentation?

Defending Against Consumer Class Action Claims Premised Upon Regulatory History

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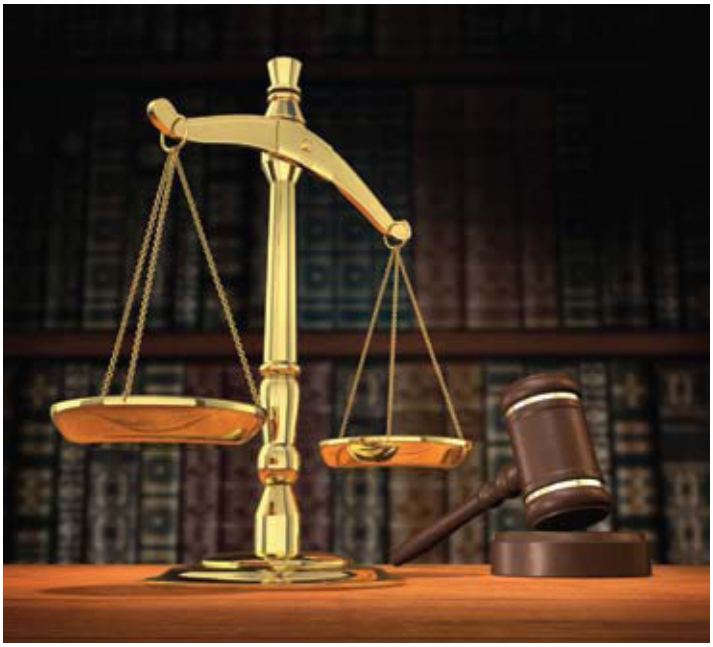
The unfortunate reality for most long term care providers is that citations happen. While providers strive for citation-free surveys, the seeming subjectivity, inconsistency, and unpredictability of the regulatory oversight process make this goal more aspirational than realistic, especially for those with challenging resident populations and decreasing reimbursement rates.

This reality becomes even more frustrating when realizing that citations may give rise to new forms of liability outside the regulatory arena. Indeed, survey results can serve as a breeding ground for civil lawsuits given that these results are publicly available and that, on their face, they purport to highlight a facility's deficiencies.

Although plaintiffs' lawyers have historically been unsuccessful in using these survey results as per se evidence of negligence, it appears that they are now becoming more creative. In a series of recent lawsuits filed nationwide, plaintiffs have alleged consumer class action theories premised upon the notion that long term care providers misrepresented the quality of their care.[1] The provider's regulatory history, and particularly the existence of any past citations, supposedly served as evidence of substandard care. The obvious appeal of this concept—at least to plaintiffs' lawyers—is that it allows consumer class action claims against virtually any long term care provider that has ever received a citation. According to this theory, plaintiffs would only need to connect the citation to some blanket statement about high-quality services or adherence to the law to demonstrate a misrepresentation.

Fortunately, the momentum of these early cases may have stalled. In three recent class action lawsuits against Extendicare Health Services Inc., plaintiffs alleged that Extendicare's citations served as conclusive evidence that it engaged in false and deceptive consumer practices. All three of these lawsuits were dismissed, resulting in several published opinions, which provide important guidance for defending against consumer class action claims in the long term care setting.[2] Perhaps most significant, these opinions explain why citations do not, by themselves, imply misrepresentations and consumer law violations.



The Playbook

In August 2008, a class action complaint was filed against Extendicare in Washington state court.[3] The estate of a former resident of one of Extendicare's skilled nursing facilities (SNFs) was listed as the sole class representative of a class that purported to include every resident of *each* of Extendicare's fifteen SNFs in Washington from 2004-2008. After holding a press conference on the filing of the case, plaintiffs' counsel would later add two additional class representatives to the lawsuit.

Following the consumer claim playbook, plaintiffs alleged that Extendicare engaged in false and deceptive advertising by representing that its SNFs provide high-quality services, including such statements as, "Extendicare has always maintained quality standards above government regulations and this is a tradition that will continue with the new operating structure." Plaintiffs also focused on language in Extendicare's admission agreement, which stated that Extendicare provides nursing services "as required by law." The hook, according to plaintiffs, was that Extendicare's Washington SNFs did not provide services "as required by law" or "above government regulations" because like most facilities in the state, they had received regulatory citations. Thus, plaintiffs argued that Extendicare's statements were actually misrepresentations in violation of Washington's Consumer Protection Act (CPA).

As an underscore to this lawsuit, it was clear that if plaintiffs could succeed in Washington, similar lawsuits would be brought in other states throughout the country. Indeed, less than one month after the Washington complaint was filed, a virtually identical class action lawsuit was filed against Extendicare in Minnesota. Using the same playbook, plaintiffs' counsel in the Minnesota case named just one resident as the class representative, yet purported to file the class action claims on behalf of *every* resident in *all* of Extendicare's Minnesota facilities from

2002-2008. As in Washington, other plaintiffs were added after counsel for plaintiffs issued a press release. Later, in November 2008, another plaintiff's attorney filed a copycat lawsuit against Extendicare in Wisconsin.

Distinguishing Between Representations and Puffery

Extendicare ultimately defeated all three of these lawsuits on motions to dismiss and motions for summary judgment. One of Extendicare's central arguments was that the supposed false advertising at issue was so general that it could not be considered as a "representation" at all. The Honorable Donovan W. Frank of the U.S. District Court for the District of Minnesota agreed, concluding that the advertising was more accurately characterized as mere "puffery."[4] Frank explained that Extendicare's statements were so "general and unspecific that they cannot serve as the basis for a claim under any of the consumer protection statutes upon which plaintiff relies."[5] Frank contrasted Extendicare's general and vague statements with promises to provide certain types of care under specifically identified programs, which could potentially give rise to consumer claims.

Of course the problem is that allegations regarding more specific representations are only applicable to residents on a case-by-case basis. These types of single cases with limited damage amounts simply do not have the same appeal to plaintiffs' lawyers. Thus, in the Extendicare class actions, plaintiffs' counsel intentionally and necessarily made their allegations general and unspecific, only to find that this strategy would undermine their claims.

Recognizing the Nature of the Highly Regulated Long Term Care Industry

In dismissing plaintiffs' claims, both Frank and the Honorable John C. Coughenour of the U.S. District Court for the Western District of Washington also recognized the significance of the highly regulated nature of the long term care industry. Frank found that in such a setting, where SNFs are required by law to provide certain services under a comprehensive regulatory scheme, statements that simply recite "that fact do not create a promise independent of the legal obligations imposed."[6] Therefore, according to Frank, Extendicare's statement that it provides SNFs "as required by law" was not a specific representation about the level of services that it provides; it was simply a description of the *type* of services it provides.[7]

Coughenour addressed plaintiffs' companion argument that Extendicare had a duty to disclose its regulatory citations with prospective residents based upon the consumer law principle that a seller has a duty to disclose false facts material to a transaction when the facts are known to the seller but not easily discoverable to the buyer. Coughenour rejected this argument, explaining that Extendicare's regulatory history was publicly available.[8] In doing so, Coughenour put the burden on prospective residents to research a provider's regulatory history. To rule otherwise would be to force SNFs to engage in the impossible and utterly impractical task of affirmatively disclosing each and every citation that they had ever received.

Implicit in both of these rulings is recognition of the artificiality of plaintiffs' depiction of the survey process. This goes to the core of what a citation really means. While it may signify that a regulation has been violated, it should not be used to taint the entire picture of a provider's care. It is simply unrealistic to assume that a provider cannot receive a citation and, at the same time, provide high-quality services that are consistent with all applicable laws and regulations.

Individual Plaintiff Experiences Still Matter

Coughenour also largely based his dismissal of plaintiffs' claims upon the individual experiences of the three named plaintiffs. Pointing to undisputed evidence in the record, Coughenour explained that the plaintiffs themselves did not rely upon any of Extendicare's representations before being admitted to its facilities and thus, these representations could not have caused plaintiffs' harm.[9] This holding is significant in the class action context because it clarifies that putative class representatives must be able to satisfy the basic elements of their individual claims before these claims are given class treatment.

Looking Forward

As long as citations are publicly available, it is likely that plaintiffs' attorneys around the country will search for ways to use them to construct claims. That said, the recent class actions demonstrate the roadblocks these attorneys will have when attempting to assert consumer class claims based upon regulatory history. It will always be difficult to make allegations that are typical and common to a class of individuals, while still alleging a valid claim that is not so general and unspecific that it can sustain a motion to dismiss. More fundamentally, the Extendicare class actions demonstrate that it is artificial and inconsistent with the realities of the industry to equate citations with misrepresentations.

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1 *See, e.g., Boone v. S&F Management Co., Inc.*, No. 07CC01402 (Cal. Super. Ct., filed Nov. 6, 2007); *Deburger v. Life Care Ctrs.*, No. 07CC01225 (Cal. Super. Ct., filed Mar. 13, 2007); *see also* Kathy Robertson, *Lawyer Uses a Car Law on Nursing Homes*, Sacramento Bus. J., Jan. 28, 2008; *Class Action Filed Against Nursing Home Management Company in California*, Mealey's Litig. Rep.: Class Actions, Nov. 15, 2007; Amanda Covarrubias, *13 Nursing Homes Accused of Abuse, Fraud in Suit*, L.A. Times, Mar. 17, 2007, at Part B, p. 3; *26 California Nursing Homes Make Unlawful Profits, Lawsuit Alleges*, PR Newswire, June 14, 2006.

2 The first lawsuit, brought in Washington, was dismissed by the U.S. District Court for the Western District of Washington on March 24, 2009. *See Steele v. Extendicare Health Servs., Inc.*, 607 F. Supp. 2d 1226 (W.D. Wash. 2009). The second lawsuit, brought in Minnesota, was dismissed by the U.S. District Court for Minnesota on March 4, 2009. *See Bernstein v. Extendicare Health Servs., Inc.*, 607 F. Supp. 2d 1027 (D. Minn. 2009); *motion for reconsideration denied Bernstein v. Extendicare Health Servs., Inc.*, 653 F. Supp. 2d 939 (D. Minn. June 11, 2009); *see also Bernstein v. Extendicare Health Servs., Inc.*, 653 F. Supp. 2d 949 (D. Minn. June 25 2009) (awarding costs to Extendicare). The third lawsuit, brought in Wisconsin, was dismissed by a Wisconsin state court on August 24, 2009.

3 The case was later removed to the U.S District Court for the Western District of Washington.

4 *Bernstein*, 607 F. Supp. 2d at 1032.

5 *Id.*

6 *Id.*

7 *Id.*

8 *Steele*, 607 F. Supp. 2d at 1234.

9 *Id.* at 1232-1233.

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