PUBLICATION

Nursing Home Litigation in the Coliseum

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Even in a miserable economy, long term care litigation is still big business. For more than a decade, the industry has been buffeted by supersized jury verdicts supported not by the actual physical injuries and damages of the plaintiffs, but rather by fear and anger coaxed out of jurors by zealous plaintiffs attorneys, unstanched by judges who are loath to control the type and amount of evidence sought during discovery and presented at trial. That an injury occurs in a nursing home is now seen as an automatic multiplier for increasing the value of a case.

In response to the increasing costs of litigation and the unpredictable jury awards, many nursing homes began using arbitration agreements as part of their admission procedures. However, a recent award in a Tennessee case shows that even arbitration does not guarantee a result unsullied by error or marked by reasonableness.

The $2.7 million award by an arbitration panel on August 25, 2009 against a long term care provider has caused a stir among attorneys on both sides of the "v" in long term care litigation. A Complaint for Declaratory Judgment Vacating Arbitration Award has now been filed in the Western District of Tennessee, naming the original plaintiffs and their counsel as defendants. *Mariner et al v. Sherrod et al*, 2:09-cv-02613-tmp, (WDTN, filed September 18, 2009).

In the underlying case, the arbitration panel of three found the three corporate defendants – Mariner Health Care, Inc., Mariner Health Care Management Company, Inc., and National Heritage Realty, Inc. d/b/a High Pointe Health and Rehabilitation – violated the Tennessee Adult Protection Act (TAPA); engaged in intentional, fraudulent or malicious conduct; committed medical malpractice; and were liable for punitive damages. Though alleged, the panel did not find that the resident's death four months after her discharge from the Mariner facility was caused by any of the defendants' actions.

Yet the panel awarded compensatory damages of $876,396.32 under two different legal theories (TAPA and medical malpractice), punitive damages of $1.5 million and attorneys' fees of $400,000.

The resident was admitted to the Mariner facility on July 30, 2004 with diagnoses including insulin dependent diabetes, peripheral neuropathy, peripheral vascular disease and osteomyelitis. Upon admission, she also had a Stage I ulcer on her buttock/sacrum and a Stage II ulcer on her left heel. She was discharged from the Mariner facility on November 15, 2004 to an acute care hospital. Thereafter she was a resident at two additional long term care facilities. She died on March 24, 2005 with gangrene listed as the cause of death.

In the petition to vacate the arbitration award, the Mariner entities assert the only physical injury or damage was an exacerbation of the sacral ulcer. As such, the Mariner entities argue that awarding separate damages for pain and suffering and emotional distress under both TAPA and medical malpractice theories for a single injury was duplicative and quasi-punitive in nature.

TAPA provides for a right of recovery in a civil action for compensatory damages for abuse or neglect of an elderly person or disabled adult.[1] However, TAPA specifically excludes from its scope a claim that falls within the ambit of the medical malpractice act.[2] Whether a claim can be brought under TAPA or medical malpractice

turns on whether the alleged act was one of simple negligence and within the knowledge of a layperson, or one which requires expert testimony.

Mariner's argument is sound: not only is recovery under TAPA for what is medical malpractice prohibited by the language of the statute, allowing twice the recovery for the pain and suffering and emotional damages for a single injury is a windfall for the plaintiffs and unfair to the defendants.

The Mariner parties also challenge the constitutionality of the punitive award, and point out the award amounts to greater than 10% of the company's net worth.

The end result is that neither party can expect a resolution any time soon unless they are able to settle the case. That bodes ill for the industry and the huge number of baby boomers expected to become consumers of housing and services for the aged in the next ten to twenty years. Providers can no more pay excessive sums of money to aggrieved parties and still run a business than can aggrieved parties wait out the lengthy process of trial and appeals.

It's not just the involved parties who are injured by such results: the judicial system's goal of resolving matters in a just, speedy and efficient manner is thwarted. There are no easy solutions to the myriad competing interests. But where neither side believes they will get a fair shake, litigants turn into gladiators of sorts, resolving cases only after all involved are utterly exhausted by the process and one party finally wins by being the last one standing.

1. Tenn. Code Annotated § 71-6-120(b) & (d).

2. Tenn. Code Annotated § 71-6-120(g).