



Client Advisory

Potential for Medical Malpractice Plaintiff to Avoid the Malpractice Cap by Suing under the Virginia Consumer Protection Act

Recent decision opens the door for compensatory damages for bodily injury under the Virginia Consumer Protection Act. In *Humphrey v. Leewood Healthcare Center*, Case No. CL-2007-662 (Fairfax Cir. Ct. May 31, 2007), the Fairfax County Circuit Court allowed a cause of action under the VCPA for misrepresentation regarding the level of supervision provided by a nursing facility. The court also refused to dismiss the claim to the extent that it sought personal injury damages. The court acknowledged a split among Virginia's circuit courts regarding the definition of "actual damages" under the VCPA but chose to overrule a 1996 Fairfax County decision that limited damages to out-of-pocket, pecuniary losses. The court, however, dismissed the case with leave to amend based on the lack of specificity of the pleading.

This outcome is of particular relevance to nursing facilities because plaintiffs alleging negligent care are subject to caps of \$350,000 in punitive damages and \$1.9 million in total damages under the Virginia Medical Malpractice Act, whereas recovery under the VCPA based on a successful allegation that a facility misrepresented the level of care to be delivered may include unrestricted damages for bodily injuries in addition to medical costs. As a result, nursing facility providers should be especially careful when soliciting new residents with printed language or oral promises concerning safety and supervision. This decision also underscores that nursing facilities should adequately screen residents to prevent admittance of a resident whose needs exceed the capabilities of the facility's services or whose behavior poses a risk to other residents.

Misrepresentation of level of care provided distinguished from claim based on deficient care. In *Humphrey*, the plaintiff argued that prior to his father's admission at a nursing facility, the staff misrepresented that they could provide an appropriate level of care for his father who suffered from dementia, had a tendency to wander, and was unable to walk safely unassisted. The plaintiff's father wandered outside of the facility on two occasions and on the second occasion suffered a broken hip closely followed by a fatal heart attack. The plaintiff claimed that defendant's misrepresentation violated the VCPA and resulted in his father's death.

The VCPA governs consumer transactions including the "advertisement, sale, lease, license or offering for sale, lease or license, of goods or services to be used primarily for personal, family or household purposes". The defendant facility argued that nursing facility services were not consumer transactions. The court disagreed, holding nursing facility care to be a service used for family purposes.

The defendant facility next argued that the nursing facility industry was excluded from the VCPA as a heavily regulated industry "authorized" by the Virginia Board of Medicine and Virginia Medical Malpractice Act. The court found that the authorization exception did not apply because regulations do not affirmatively permit or regulate the

type of conduct alleged. In distinguishing between misrepresentation of care to be delivered from deficiency of care actually delivered, the court cited *Beaty v. Manor Care, Inc.*, 2003 U.S. Dist. LEXIS 25044 (E.D. Va. 2003). *Beaty* explained that the authorization exception did not apply because “Plaintiffs are not alleging that the facility advertised a level of care it was not *licensed* to provide, but rather that it advertised care it did not provide.”

In *Beaty*, the plaintiff sued a nursing facility and administrator for breach of contract, fraud, violation of the VCPA, intentional infliction of emotional distress to resident, false advertising, and emotional distress to family after a resident was physically attacked by other residents and allegedly by employees. The court allowed all but the claim of emotional distress to the resident’s family to proceed. In addressing the count under the VCPA, the *Beaty* court noted in dicta that, “If the Plaintiffs’ claims under the VCPA were that the quality of care provided by the facility was deficient, such a claim likely would be exempted from the statute [VCPA] because the Virginia code addresses the degree of care that must be provided by adult-care facilities to their residents.” The *Beaty* court noted that this distinction has been made in the state of Georgia under an analogous law, Georgia’s Fair Business Practices Act. This indicates that a claim of misrepresentation of the level of care to be provided may be pursued under the VCPA but not a claim based on the delivery of deficient care.

Split over definition of “actual damages” under the VCPA. There is some disagreement about the extent of “actual damages” allowed under the VCPA. In the absence of a statutory definition for “actual damages”, *Humphrey* cited the Black’s Law Dictionary definition of real damages for its inclusive reading of the term: “Real, substantial and just damages, or the amount awarded to a complainant in compensation for his actual and real loss *or injury*.”

Notably punitive damages are barred by *Humphrey*’s definition. This appears consistent with the statutory language which awards the greater of “actual damages” or \$500 and provides that if the violation is willful, the statute awards the greater of three times the “actual damages” or \$1,000, as opposed to a jury award for punitive damages. Despite the lack of availability of punitive damages under the VCPA, recovery for bodily injury is significant because such damages are not subject to a cap, a jury makes the subjective determination for awards such as pain and suffering, and such damages are not available under alternative causes of action such as breach of contract.

If a plaintiff advances multiple theories of recovery for an injury arising from a single transaction or occurrence, he may not recover both verdicts in full, but he may recover the greater of each type of damage award between multiple claims. For example, in *Wilkins v. Peninsula Motor Cars*, 266 Va. 558 (2003), a successful plaintiff under both the VCPA and common law fraud elected to receive punitive damages based on fraud but actual damages and attorney’s fees under the VCPA (the actual damages under the VCPA were significantly greater than actual damages awarded under the fraud claim because the willful violation resulted in an award of three times the actual damages).

Specificity required of a VCPA pleading. A violation of the VCPA includes “[m]isrepresenting that goods or services are of a particular standard, quality, grade, style or model”. In *Beaty*, the plaintiffs alleged that when seeking placement for their family

member in a nursing facility, the defendant's agent and brochure both stated that the facility had a staff highly experienced in caring for Alzheimer's patients, staff frequently received additional training, staff provided 24-hour supervision, facility had a high ratio of staff to patients, and the facility was "safe". The court found that these representations were not too vague, particularly in light of the context of a family asking questions to assess whether a facility could address the specific needs of an Alzheimer's patient, to survive a motion for summary judgment. The court also found that promises of future action are actionable if there is no intent to perform when the promise is made.

In addition, the *Beaty* court found that the claim stated causation sufficient to overcome summary judgment. Although there are conflicting opinions of whether reliance on an assurance of safety in the context of leasing an apartment is actionable, the court noted that in this case there was sufficient reliance demonstrated. But for the misrepresentations, Mr. Beaty would not have been placed at the facility. As for proximate cause, "in this case both the third party aggressor and the injured Plaintiff were under the exclusive control of Defendants. In this case, given the unique situation within an assisted care facility, the Court believes that at this state of the proceedings the issue of proximate causation is one for the jury."

The unique situation of nursing facilities has been noted in other contexts. In a negligence action against an adult home (from which residents could come and go), *Commercial Distributions, Inc. v. Blankenship*, 240 Va. 382, 297 S.E.2d 840 (1990), the court held the staff of the home to the lay person standard of care and limited the scope of the duty to the home's premises. In contrast, nursing facilities are held to a high standard of care concerning such matters as knowledge of residents' whereabouts and prevention of residents' wandering.

Duty to residents under the VCPA arises when a facility represents that it performs to specific standards. In essence, a facility voluntarily assumes the level of care represented by the facility and reasonably relied upon by a resident or his representative upon admission. Statements which are false when made and/or made despite known deficiencies which cannot be swiftly remedied are particularly suspect. In *Beaty*, the court cited allegations of missing training manuals as part of its determination of the sufficiency of the pleading.

How should nursing care providers respond? Literature should be accurate and not overstate the factual capabilities of a facility, particular care should be given to relating specific policies and procedures. Additionally, agents of a facility should do the same. Even if they do not intentionally make a misrepresentation, agents also have a duty to correct the known misconceptions of prospective residents or their relatives.

This information is provided as a public service to Mellette PC clients. Should you have further questions, please contact Peter Mellette at (877) MELLETTE – (877) 635-5388. This advisory is not intended to provide legal advice about a specific issue; please contact your attorney for more information.

Mellette PC acknowledges with appreciation the assistance of Kelly Pereira, '08, Marshall-Wythe School of Law, in preparing this advisory.

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