



**Buchanan  
Ingersoll &  
Rooney** PC

## Long Term and Post-Acute Care Update: Verdicts, Corporate Negligence & Industry Developments

Matthew T. Corso, Esq.  
January 16, 2019

A black and white photograph of a hand holding a tablet. The tablet screen displays a grid of medical scans, likely MRI or CT images of a brain, arranged in rows and columns. The background is blurred, showing other people in a clinical or professional setting.

# Agenda

- Industry Trends
- Arbitration
- Corporate Negligence
- Staffing Developments
- Verdicts
- Consumer Protection
- Proposed Change of MCARE Venue Rule



## 2018 Trends in National Press

- Staffing
- Payment Models
- Home-Health
- Acquisitions
- False Claims Act



# Proposed Change of MCARE Venue Rule

# Current MCARE Venue Rule

- The PA General Assembly enacted the Medical Care Availability and Reduction of Error (MCARE) Act in 2002
- Plaintiffs in medical malpractice cases are limited to filing suit in the venue *where the cause of action arose*
- Court statistics show that the total number of medical malpractice cases have dropped nearly 50% from the pre-MCARE yearly average

# Proposed Change to MCARE Venue Rule

- The proposed change would allow injured plaintiffs to bring suit in any venue where the health care provider defendants *regularly do business*
- Defense bar has raised concerns about forum-shopping and overwhelming the court dockets in certain counties
- The State Supreme Court's Civil Procedural Rules Committee is seeking comments on the proposal, with February 22, 2019 as the deadline for submissions
- After the comment period ends, the rules committee can either withdraw the proposal, modify the rules, or pass the proposal to the state Supreme Court for a final determination on whether the changes will be made

# Skilled Nursing and Post-Acute in the News

The  
New York  
Times



THE  
NATIONAL  
LAW REVIEW

# Skilled Nursing and Post-Acute in the News

- Staffing

- It's Almost Like a Ghost Town.' Most Nursing Homes Overstated Staffing for Years
  - The New York Times, May 31, 2018

- Payment Methods

- Medicare to Cut Payments to Nursing Homes Whose Patients End Up Back in the Hospital
  - NPR, December 1, 2018

- Home Health Care

- As the US Population Ages, the Need for Home Health-Care Workers Skyrockets
  - CNBC, June 2018

# Skilled Nursing and Post-Acute in the News

- Acquisitions
  - ProMedica Acquisition of HCR ManorCare
  - Looking Ahead to the Top Skilled Nursing Trends of 2019
    - Skilled Nursing News, December 17, 2018
- Federal Claims Act
  - DOJ False Claims Act Statistics from FY 2018: Total Collections Fall While Healthcare Recoveries Rise
    - The National Law Review, December 26, 2018



# Arbitration

# Arbitration Agreements

- *Marmet v. Brown*, 132 S.Ct. 1201 (2012)
  - Arbitration Agreements in nursing home admissions fall within the purview of the Federal Arbitration Act (“FAA”)
  - The FAA generally favors arbitration
  - Nursing Home arbitration agreements may not be voided on **public policy** grounds
  - Traditional contract defenses, including **unconscionability**, are still available

# SCOTUS Reaffirms Arbitration

- Kindred Nursing Ctrs. v. Clark, 137 S.Ct. 1421 (2017).
- Nursing home arbitration case involving interpretation of Power of Attorney document.
- SCOTUS once again reversed state court (Kentucky) attempting to circumvent arbitration through “fanciful” application of state law.
- Reaffirms that Federal Arbitration Act (“FAA”) preempts any attempt to disfavor arbitration agreements.

# Arbitration - Enforcement Issues

- Does the person signing have proper authority?
  - *Washburn vs. Northern Health Facilities*, 121 A.3d 1008 (Pa.Super.2015)
  - *Kindred Nursing Centers LP vs. Clark*, 137 S.Ct. 1421 (2017) – found that a state court rule requiring that power of attorney document must confer specific authority to waive the right to a jury trial was in violation of the FAA
- Unconscionability?
  - *MacPherson vs. Magee Mem'l Hosp.*, 128 A.3d 1209 (Pa. Super. 2015)

# Arbitration – Enforcement Issues

- Capacity?
  - High standard.
  - *Garcia vs. ManorCare*, 2016 WL 127514 (Pa.Super. 2015)
    - Capacity is presumed as a matter of law
    - Testimony of party challenging is insufficient without more evidence
    - Sickness or old age is insufficient to void an agreement

# Arbitration – Enforcement Issues

- Is the forum selected unavailable?
  - *Stewart vs. GGNSC-Canonsburg*, 9 A.3d 2015 (Pa.Super. 2010); *Wert vs. GGNSC*, 124 A.3d 1248 (Pa. 2015) (unavailability of forum voids where forum is integral)
  - *MacPherson vs. Magee Mem'l Hosp.*, 128 A.3d 1209 (Pa. Super. 2015) (agreement not voided where forum is not integral)

# Arbitration – Wrongful Death

- **Arbitration and Wrongful Death Claims:**

- *Pisano v. Extendicare*, 77 A.3d 651 (2013) – wrongful death claim not subject to arbitration when agreement not signed by wrongful death beneficiary
- Exception: *MacPherson* (wrongful death action brought by personal representative who is not a statutory beneficiary)

- **Bifurcation of Wrongful Death and Survival Claims**

- *Taylor v. Extendicare*, 637 Pa. 163 (2016) – where there is a wrongful death claim that is not subject to arbitration under *Pisano* and a survival claim that is subject to arbitration, the claims are bifurcated, with the survival claim going to arbitration

# Arbitration – Regulatory Developments

- October 4, 2016: CMS publishes final rule prohibiting use of arbitration agreements in Long-Term Care Facilities 42 C.F.R. § 483.70(n)(1).
- Regulation challenged in *American Health Care Ass'n vs. Burwell* (District Court for N.D. Mississippi, Civil Action No. 3:16-CV-00233), and a preliminary injunction was entered
  - CMS appealed to the Fifth Circuit
  - June 5, 2017: CMS issues a new proposed rule removing the ban
- *Kindred Nursing Centers LP vs. Clark*, 137 S.Ct. 1421 (May 15, 2017) – second decision in 5 years affirming that nursing home arbitration agreements are enforceable under the FAA



# Corporate Negligence

Richard Scampone, as Executor of the Estate of Madeline Scampone  
v.  
Grane Healthcare Company, Grane Associates, L.P., Highland Park Care Center,  
LLC d/b/a Highland Park Care Center, & Trebro, Inc.

2017 Pa. Super. 257, 2017 WL 3392480 (Pa. Super. 2017)

## August 8, 2017: Holding that Management Company Had Duty to Resident

- Pursuant to a management services contract, “management company” created policies and procedures
- Even though the licensed operator set staffing levels, “management company” approved the budget
- “Management company” hired and trained licensed operator’s registered nurses and appointed its Director of Nursing

## August 8, 2017: Holding that Management Company Had Duty to Resident

- “Management company” employed nurse consultants who visited licensed operator weekly to oversee patient care
- “Management company’s” employee supervised NHA
- “Management company” established and administered a Quality Assurance Program

# Holding

- *Only* Highland Park, the licensed operator, may be directly liable for corporate negligence
- Grane's contractual undertaking to manage and oversee Ms. Scampone's care was necessary for her protection
- Grane, the management company, may be vicariously liable for the actions of its nurse consultants, who oversaw Highland Park staff and failed to ensure patients received appropriate care. But it has no direct liability.

# Takeaway

- “Management company’s” contractual undertaking to manage and oversee resident’s care was necessary for her protection
- *Only* the licensed operator may be directly liable for corporate negligence
- The management company may be vicariously liable for the actions of its nurse consultants, who oversaw the nursing staff and failed to ensure patients received appropriate care



# Staffing Developments

# SNF Staffing Requirements

## 42 CFR § 483.30

---

- “The facility must have sufficient nursing staff ... to provide nursing and related services to ... attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident, as determined by resident assessments and individual plans of care and considering the number, acuity and diagnoses of the facility's resident population...”.

## 28 Pa. Code § 211.12(i)

---

- A minimum number of general nursing care hours shall be provided for each 24-hour period. The total number of hours of general nursing care provided in each 24-hour period shall, when totaled for the entire facility, be a minimum of 2.7 hours of direct resident care for each resident.

# CMS and Payroll Based Journal Data

- Facility staffing information submitted quarterly and represents the number of hours staff are paid to work each day that quarter
- Aims to improve the accuracy of public reporting and provide greater insight to how facility staffing relates to quality outcomes
- Public postings of each facility's daily hours
- Postings sometimes reveal several days in a quarter without an RN onsite or significantly low nurse staffing on weekends

# CMS and Payroll Based Journal Data

- CMS began informing state survey agencies of facilities with potential staffing issues in November 2018
- Previously, CMS required States to conduct at least 10% of the facility standard health surveys “off hours” (on the weekends or before 8 am or after 6 pm)
  - Now, States are required to conduct at least 50% of the required off-hours surveys on weekends, using a list of facilities provided by CMS
- CMS is aiding surveyors’ investigations by identifying facilities that have a higher risk of noncompliance with the RN staffing requirements
  - Noncompliant facilities are cited under deficiency F-tag 727

# CMS and Payroll Based Journal Data

- CMS is updating the Payroll Based Journal Policy Manual:
  - Meal Break Policy—more guidance provided regarding deducting time for meal breaks
  - Universal Care Workers (CNAs who perform additional duties outside of the nurse aid role)—facilities must use a reasonable methodology to allocate the hours that these employees are providing CAN services and report the hours accordingly. Facilities shall not report hours spend on housekeeping, cooking and other duties as CNA hours.

“ The understaffing during the \_\_\_\_ days amounted to \$\_\_\_\_\_ per day for a total savings from understaffing of \$\_\_\_\_\_. ”

- Expert Report



# Significant Recent Verdicts

# Lancaster, PA Verdict Overview

- Suit brought by estate of former resident of nursing home as a result of a sexual assault by another resident.
- Named Defendants – Parent Company, Facility and Assailant
- Decedent – 82 years old at the time of alleged assault, suffered from dementia/mild Alzheimer's
- Assailant – 20 years younger than Decedent, registered sex offender in PA resulting from guilty plea for sexual assault at knifepoint in 1993.

# Lancaster, PA

## Report to Office of Aging

- Report indicated that:
  - Decedent had dementia/mild Alzheimer's
  - Decedent was involved in "relationship" with Assailant
  - Assailant was a convicted sex offender with a sex addiction, who was focusing on Decedent because of her cognitive issues
  - Assailant was ***"grooming her for a sexual relationship"***
  - The Facility was ***"very concerned"*** that Decedent would be ***"sexually victimized"*** by Assailant
- As a result of the report, a care plan was placed in Decedent's chart which indicated that she was at risk for sexual assault

# Lancaster, PA

## Plaintiff's Allegations

- Primary Allegation: Sexual assault of Decedent by Assailant (no allegation that assault contributed to her subsequent death)
- Assailant observed leaving Decedent's room and a CNA observed Decedent with her pants down, redness in her peri area, and bruises on her hands
- Plaintiffs alleged that Assailant displayed increasingly erratic behavior and made inappropriate remarks prior to the assault, including a verbal threat to rape a staff member

# Lancaster, PA

## Verdict

- Jury found Parent Company and Facility to be 85% liable (37.5 to Parent Company and 47.5 to Facility) and Assailant 15% liable
- Jury found that Facility showed reckless indifference in failing to prevent the assault and awarded punitive damages
- \$7.5 million dollar verdict for Plaintiffs in Lancaster County

# Paducah, KY Verdict

## Overview

- Suit brought by guardian of resident against the facility and its ownership
- Resident – 60-year-old amputee with history of stroke. He experienced eight difference episodes of dehydration at the facility and later developed nausea and severe pain.
- The Incident – Nursing staff left him in bed, in distress, for 27 hours before calling paramedics to transfer him to a local hospital. When he was transferred, he was diagnosed as being severely dehydrated and in hypovolemic shock and acute kidney failure. He received 27 liters of fluid at the hospital before being sent back to the facility. Upon return to the facility, he fell, breaking his hip in three places. The resident is not a candidate for hip surgery.

# Paducah, KY

## Plaintiff's Allegations

- The suit alleged negligence in violation of Kentucky's resident's rights law for choosing not to timely transfer him to a hospital when staff knew or should have known of his acute medical condition and failing to provide adequate hydration.
- Plaintiff maintained that the facility and its ownership had a policy of non-transfer of residents to hospitals for reimbursement purposes and that its nurses chose not to note the resident's dehydration in his records or provide him with sufficient water.
- Plaintiff further argued that the facility chose not to notify his family of the dehydration episode preceding his hospitalization.

# Paducah, KY

## Verdict

- Jury awarded \$28.5 million in McCracken County
  - (\$25 million punitive damages award for the willful and wanton conduct of the facility, its personnel and its ownership)



# Consumer Protection

# Consumer Protection Claims

- Long term care establishments are increasingly finding their advertising claims under fire as plaintiffs use state consumer protection statutes to lodge malpractice claims against them
- Many state consumer protection acts that were originally enacted to address advertising fraud have been expanded to address fraud in consumer transactions

# Typical Allegations Involving Consumer Protection

- Facilities have false and misleading marketing and staffing based on care needs
- Facilities fail to staff facilities to the needs of the residents
- Residents pay for services they do not receive
- Facilities fail to staff according to resident assessments and assessed care groups

# Commonwealth v. Golden Gate Nat'l Senior Care, LLC

- In July 2015, the Attorney General filed a complaint against more than two dozen nursing homes and their parent companies alleging violations of the Pennsylvania Unfair Trade Practices and Consumer Protection Law ('UTPCPL')
- The complaint claimed that through deceptive advertising and marketing materials, the nursing homes made materially misleading statements about the nature and quality of the care provided to their residents and intentionally understaffed facilities in order to maximize profits.

# Commonwealth v. Golden Gate Nat'l Senior Care, LLC

- *“Snacks and beverages of various types and consistencies are available at any time from your nurse or nursing assistant.”*
- *“We have licensed nurses and nursing assistants available to provide nursing care and help with activities of daily living . . . Whatever your needs are, we have the clinical staff to meet those needs.”*
- *“Clean linens are provided for you on a regular basis, so you do not need to bring your own.”*

# Commonwealth v. Golden Gate Nat'l Senior Care, LLC

- *“A restorative plan of care is developed to reflect the resident’s goals and is designed to improve wellness and function. The goal is to maintain optimal physical, mental and psychological functioning.”*
- *“A container of fresh ice water is put right next to your bed every day, and your nursing assistant will be glad to refresh it for you.”*
- *“We work with an interdisciplinary team to assess issues and nursing care that can enhance the resident’s psychological adaptation to a decrease of function, increase levels of performance in daily living activities, and prevent complications associated with inactivity.”*

# Commonwealth v. Golden Gate Nat'l Senior Care, LLC

- Allegations in Complaint:
  - Statements were misleading because they created the impression that the facilities would provide care that they did not, in fact, provide
  - Facilities generated billing statements which indicated certain care was provided when it was not

# Commonwealth v. Golden Gate Nat'l Senior Care, LLC

- Regarding the UTPCPL claims, the lower court found that statements contained in the advertising materials were mere “puffery”—patently hyperbolic or excessively vague in character such that no reasonable consumer should rely on them

# Commonwealth v. Golden Gate Nat'l Senior Care, LLC

- The Pennsylvania Supreme Court, however, reasoned that “residents of nursing homes, many of whom are physically compromised and require assistance with day-to-day living activities,” would reasonably rely on “statements promising to provide food, water, and clean linens,” and would have no reason to not take the statements seriously
- Pennsylvania Supreme Court reversed the Commonwealth Court’s dismissal of the UTPCPL claims

- Although the Pennsylvania Supreme Court revived the lawsuit, *Foflygen v. Zemel*, 420 Pa. Super. 18 (1992) holds that UTPCPL claims are not available in medical malpractices cases because the statute is inapplicable to medical services

# Trends in other states

- **New Jersey** Consumer Fraud Act does not permit claims for nursing home abuse
  - *Manahawknin Convalescent v. Frances O'Neill*
- **Virginia** Consumer Protection Act applies to claims against nursing homes
  - *Humphrey v. Leewood Healthcare Ctr.*



**Matthew T. Corso**

Shareholder

[matthew.corso@bipc.com](mailto:matthew.corso@bipc.com)

(215) 665-3832

Philadelphia

**Buchanan Ingersoll & Rooney PC**

This PowerPoint presentation is for informational purposes only and does not constitute legal advice or a legal opinion on any specific facts or circumstances. The contents are intended as general information only. You are urged to consult your own lawyer concerning your situation and specific legal questions you may have.

Copyright © 2017 Buchanan Ingersoll & Rooney. All rights reserved.