

Consumer Concerns for Older Americans

When You Can't Go Home Again: Using Consumer Law to Protect Nursing Facility Residents

Finding affordable, quality long-term care is one of the most critical problems faced by seniors, their families, and caretakers. Because the search for quality care usually occurs during times of crisis, it is extremely difficult for seniors and their caretakers to assert their rights. The balance of power favors the nursing facility. All too often, facilities take advantage of the situation, preying on vulnerable residents. Consumer law remedies are critical in challenging instances of neglect and other blatant violations of federal and state laws.

TYPES OF LONG-TERM CARE

Nearly every one of us at some point in our lives either will enter a nursing facility or assist as someone we know faces the prospect of long-term care in a nursing facility. It is estimated that as many as half of all women over 65 in the United States and a third of all men will spend some of their remaining time in a nursing facility.^{[1](#)}

In general, nursing facilities provide room, board, assistance, and nursing services. Other types of long-term care such as assisted living facilities provide room, board, and assistance, but only limited health-related services if any.^{[2](#)} A continuing care retirement community generally includes a nursing facility and a residential care facility, and also may include apartments for independent individuals.

COMMON PROBLEMS WITH NURSING FACILITIES

Neglect and other abuses in nursing facilities is a national tragedy. A 1999 General Accounting Office (GAO) study found that between January 1997 and July 1998, there were over 1,500 substantiated cases of abuse and neglect in nursing homes.^{[3](#)} The study found that 25% of the nation's over 17,000 nursing facilities "...had deficiencies that caused actual harm to residents or placed residents at risk of death or serious jeopardy." According to U.S. Attorney General Janet Reno, the price of inadequate nursing facility care is paid "in human suffering and lost public resources."^{[4](#)} Unfortunately the primary federal law designed to curb nursing facility abuses, the Nursing Home Reform Law (NHRL), is rarely enforced and nursing facilities routinely violate its various requirements.^{[5](#)} For example, in the General Accounting Office study discussed above, there was no government enforcement action in more than 90% of the cases cited. There is a similar lack of enforcement of many state nursing facility laws.^{[6](#)}

Common nursing home abuses and violations include:

- **Requiring third party guarantees as a condition of admission.**^{[7](#)}
- **Limiting visiting hours for immediate family or other relatives.**^{[8](#)}
- **Evicting residents because they are considered to be "difficult."**^{[9](#)}
- **Requiring residents to move while Medicaid applications are pending.**^{[10](#)}

TOOLS TO CHALLENGE ABUSIVE NURSING FACILITY PRACTICES

There are several ways to challenge problems with nursing facilities including individual advocacy, complaints to the ombuds office, and litigation. Individual advocacy by residents and other interested persons, while an important first step, is often limited by the inherent inequality of the nursing home/resident relationship. Under these circumstances, residents,

friends and family members are often reluctant to complain.^{[11](#)}

In addition to individual advocacy, every state has a long-term care ombuds program for identifying, investigating and resolving complaints made by or on behalf of residents of long-term care facilities, including nursing, board and care and assisted living facilities. Shortages of staff and resources, however, may prevent the ombuds program from vigorously pursuing all claims.^{[12](#)}

Litigation can be one of the most powerful and effective ways to improve the living conditions of nursing facility residents.

SUMMARY OF CONSUMER LAW REMEDIES

Unfair and Deceptive Acts and Practices (UDAP) Statutes

Introduction to UDAP Statutes

Every state and the District of Columbia has at least one broad consumer protection statute that falls into the general category of an unfair and deceptive acts and practices (UDAP) statute.^{[13](#)} There are many advantages to using UDAP statutes to challenge abusive, deceptive, and unfair marketplace transactions.

UDAP statutes are very broad, allowing consumers to challenge a wide range of abusive behavior that may or may not violate another state or federal civil or criminal statute. Second, almost every state UDAP statute authorizes private lawsuits. Consumers can seek many different types of relief in UDAP claims, including actual, treble, minimum and/or punitive damages, injunctive relief to stop abusive practices, class actions, and in most states, attorney's fees as well.^{[14](#)} The type of relief available varies by state.

Proving UDAP Claims

Some states list the particular types of violations that can be brought under the state UDAP statute, although claims are generally not limited to the violations listed in the statute. Other states have UDAP statutes or regulations that specifically prohibit certain practices. Practices that are specifically listed in the statute or regulation should be per se UDAP violations. This means that they are automatic violations and it is not necessary for the consumer to have proof that the practice is unfair or deceptive. In many states, a violation of another state or federal statute such as the federal nursing home reform law discussed above, is a per se UDAP violation.^{[15](#)}

Although many of a nursing facility's harmful practices will violate state or federal nursing facility laws, in some cases, a particular abusive practice will not be a specific violation. This is by no means the end of the story. It is still very likely that there is a UDAP violation, but the consumer will have to prove that a particular practice is deceptive or unfair.^{[16](#)} This is a very broad standard and unlike common law fraud, consumers do not have to show that the seller or provider knew the practice to be deceptive or intended it to be deceptive.

Examples of UDAP Claims in Nursing Facility Cases:

- In Illinois, a UDAP cause of action against a nursing facility chain and a pharmacy service withstood a motion to dismiss, based on allegations that the defendants routinely misrepresented that their medication prices were lower than the prices offered by other suppliers.^{[17](#)}
- Also in Illinois, class certification was granted in a UDAP claim against a nursing facility for assessment of excessive charges for medication.^{[18](#)} A California UDAP case alleged that the facility had employed inadequate numbers of staff members, falsified records, used rotting

food, and failed to keep residents clean.[19](#)

- In Pennsylvania, a resident alleged that the facility had a practice of discharging residents who applied for Medicaid.[20](#)

Another source of UDAP claims is the failure of the nursing facility to hire competent staff and/or to provide proper training. Even though nurse's aides do most of the bathing, dressing, turning, and feeding of patients, they generally receive very little training and are paid very low salaries. In a 2000 Health Care Financing Administration report to Congress, it was found that 54% of nursing homes subject residents to harm due to inadequate staffing.[21](#)

Despite important differences between nursing facilities and assisted living facilities, many of the consumer remedies that apply to nursing facilities can also be used to challenge abusive and deceptive practices of assisted living facilities.[22](#)

GETTING STARTED WITH A UDAP CASE

Before bringing a UDAP claim against a nursing facility, advocates must first determine whether the particular state statutes cover nursing facilities. In most states, a strong argument can be made to apply UDAP statutes to nursing and assisted living facilities. For an analysis of this issue and a list of relevant state statutes, see the National Consumer Law Center's publication, "When You Can't Go Home Again: Using Consumer Law to Protect Nursing Facility Residents" (2000). Call National Consumer Law Center at 617-542-8010 to order a copy.

OTHER POSSIBLE CLAIMS

In addition to UDAP statutes, there are many other possible causes of action that should be considered, including:

- Negligence [23](#)
- Tort claims including battery, infliction of emotional distress, and false imprisonment [24](#)
- Breach of contract (based on the facility admission agreement and/or contract with Medicare or Medicaid) [25](#)
- Fraudulent Misrepresentation [26](#)
- Contract Formation Defenses [27](#)
- Unconscionability [28](#)

ADDITIONAL RESOURCES

Books and Articles

Eric Carlson, "Eleven Falsehoods Told By Nursing Facilities (And How to Counter Them)", The Elder Law Report, Vol. IX, No. 4 (Nov. 1997).

Eric Carlson, "Illegal Guarantees in Nursing Homes: A Nursing Facility Cannot Force A Resident's Family Members and Friends to Become Financially Responsible for Nursing Facility Expenses", 30 Clearinghouse Rev. 33 (May 1996).

Eric Carlson, Long-Term Care Advocacy (Matthew Bender 1999).

Stephanie Edelstein, "Living Longer: A Legal Response to Aging in America", 9 Stanford Law & Policy Rev. 373 (Spring 1998).

Diane Horvath and Patricia Nemore, "Nursing Home Abuses as Unfair Trade Practices", 20

Clearinghouse Rev. 801 (Nov. 1986).

Deanne Loonin and Elizabeth Renuart, "Less Than Six Degrees of Separation: Consumer Law Connections to Your Practice", Parts I and II, 31 Clearinghouse Rev. 584 (March/April 1998), 32 Clearinghouse Rev. 3 (May/June 1998).

Joseph L. Matthews, Beat The Nursing Home Trap, (Nolo.com 1999). More information available at [www. Nolo.com](http://www.Nolo.com).

National Citizens Coalition for Nursing Home Reform, Nursing Homes: Getting Good Care There. More information available at www.nccnhr.org.

National Consumer Law Center, Unfair and Deceptive Acts and Practices (4th ed. 1999 and Supp.).

National Consumer Law Center, When You Can't Go Home Again: Using Consumer Law to Protect Nursing Facility Residents (2000). Available from the National Consumer Law Center, 617-542-8010.

Dorothy Siemon, Stephanie Edelstein and Zita Dresner, "Consumer Advocacy in Assisted Living", 30 Clearinghouse Rev. 579 (Oct. 1996).

Selected Contacts and Web Sites:

AARP 601 E St., NW Washington, D.C. 20049 (202) 434-2277 www.aarp.org

American Bar Association Commission on Legal Problems of the Elderly 740 15th St., NW Washington, D.C. 20005-1022 (202) 662-8690 www.abanet.org/elderly

Alzheimer's Association National Headquarters 919 N. Michigan Ave., Suite 1000 Chicago, IL 60611-1676 (312) 335-5434 www.alz.org

Center for Health Care Rights 520 S. Lafayette Park Pl., Suite 214 Los Angeles, CA 90057 (213) 383-4519 www.healthcarerights.org

Center for Medicare Advocacy P.O. Box 350 Willimantic, CT 06226 (860) 456-7790 and 1101 Vermont Ave., NW Suite 1001 Washington, D.C. 20005 (202) 216-0028 www.medicareadvocacy.org

Center for Social Gerontology 2307 Shelby Ave. Ann Arbor, MI 48103 (734) 665-1126 www.tcsg.org

National Academy of Elder Law Attorneys 1604 N. Country Club Rd. Tucson, AZ 85716 (520) 881-4005 www.naela.org

National Association of Consumer Advocates 1717 Massachusetts Ave., NW, Ste. 704 Washington, D.C. 20036 (202) 332-2500 www.naca.net

National Citizens' Coalition for Nursing Home Reform 1424 16th St., NW, Suite 202 Washington, D.C. 20036-2211 (202) 332-2275 www.nccnhr.org

National Consumer Law Center 77 Summer Street, 10th Floor Boston, MA 02110 (617) 542-8010; Publications: (617) 542-9595 and 1629 K St., NW Suite 600 Washington, D.C. 20006 (202) 986-6060 www.consumerlaw.org

National Poverty Law Center 205 W. Monroe St. Chicago, IL 60606 (312) 263-3830 www.povertylaw.org

ABOUT NCLC

In 1992, NCLC received funding from the Administration on Aging (AoA) to launch a National Legal Resource Initiative for Financially Distressed Older Americans, intended to improve access to the quality of consumer representation for older Americans.

Since 1969, NCLC has been providing legal advocates with technical and expert assistance, training and publications that cover all major topics in consumer law. NCLC has established itself as the nation's consumer law specialist, making its legal expertise available to low income clients and their attorneys. These services are available to advocates representing older Americans.

NCLC is available to consult with legal advocates for the elderly on a wide range of consumer issues, providing leading and local case law, analyzing contract documents for federal and state law compliance, defining factual and legal issues, identifying experts and legal resources to strengthen cases and training attorneys in consumer law.

NCLC works with lawyers and others on consumer issues affecting low and moderate income clients. This brochure was supported, in part, by a grant from the Administration on Aging, Department of Health and Human Services, Washington, D.C. 20201. Grantees undertaking projects under government sponsorship are encouraged to express freely their findings and conclusions. Points of view or opinions do not necessarily represent official Administration on Aging policy.

[Order Form](#) (PDF)

1 "They Didn't Live So Long For This", New York Times editorial, April 26, 1999.

2 This basic definition is starting to change as more and more residential care facilities are offering health-related services.

3 General Accounting Office, Nursing Homes: Additional Steps Needed to Strengthen Enforcement of Federal Quality Standards, GAO/HEHS-99-46 (March 1999). The report is also available on the GAO's web site at www.gao.gov.

4 Remarks of Attorney General Janet Reno, Conference of Nursing Home Fraud and Abuse Working Groups, June 12, 2000. Also see the Department of Justice web site, www.usdoj.gov (August 28, 2000) or the National Citizens Coalition for Nursing Home Reform, www.nccnhr.org (August 28, 2000).

5 The Nursing Home Reform Law (NHRL) is codified at 42 U.S.C. §1395i-3, 1396r. Section 1395i-3 applies to any facility that accepts Medicare reimbursement; §1396r applies to any facility that accepts Medicaid reimbursement. The NHRL applies to every resident of federally certified facilities, regardless of a resident's payment source. For studies documenting violations of the NHRL, see Eric Carlson, Bet Tzedek Legal Services, *If Only I Had Known: Misrepresentations by Nursing Homes Which Deprive Residents of Legal Protection* (1995); Rebecca Benson, *Check Your Rights at the Door: Consumer Protection Violations in Massachusetts Nursing Home Admission Agreements* (1997).

6 See Eric Carlson, *Long-Term Care Advocacy* (Matthew Bender 1999), hereafter "Long-Term Care Advocacy." Section 2.101 of this publication has a summary of each state statute.

7 See 42 U.S.C. §1395i-3(c)(5)(A)(ii), 1396r(c)(5)(A)(ii); 42 C.F.R. §483.12(d)(2).

8 See 42 U.S.C. §1395i-3(c)(3)(B), 1396r(c)(3)(B); 42 C.F.R. §483.10(j)(1)(vii).

9 See 42 U.S.C. §§1395i-3(c)(2)(A), 1396r(c)(2)(A); 42 C.F.R. §483.12(a)(2).

10 For more information on all of these violations, see The National Consumer Law Center's publication, "When You Can't Go Home Again: Using Consumer Law To Protect Nursing Facility Residents" (2000). Also see generally Eric Carlson, *Eleven Falsehoods Told By Nursing Facilities (And How to Counter Them)*, *The ElderLaw Report* (Nov. 1997). See also *Chalfin v. Beverly Enterprises*, 741 F. Supp. 1162 (E.D. Pa. 1989) (UDAP claim based on allegation that a facility had a practice of discharging residents who had applied for Medicaid).

11 Long-Term Care Advocacy § 1.05[1].

12 The ombuds program is mandated by federal law. 42 U.S.C. § 3027(a)(12). For more information, see Long-Term Care Advocacy § 2.27[2], containing a listing of all state ombuds programs and their phone numbers at § 2.401.

13 A summary of all the state UDAP statutes can be found in National Consumer Law Center, *Unfair and Deceptive Acts and Practices*, Appendix A (4th ed. 1999 and Supp.), hereafter "The UDAP manual"

14 See UDAP manual ch. 8.

15 UDAP manual § 3.2.7.

16 UDAP manual §3.3.

17 *Rohlfing v. Manor Care*, 172 F.R.D. 330, 350 (N.D. Ill. 1997);

18 *Arenson v. Whitehall Convalescent and Nursing Home*, 164 F.R.D. 659 (N.D. Ill. 1996).

19 *People v. Casa Blanca Convalescent Homes*, 206 Ca. Rptr. 164, 167-71, 176-77 (Cal. Ct. App. 1984)

20 *Chalfin v. Beverly Enterprises*, 741 F. Supp. 1162, 1176-77 (E.D. Pa. 1989).

21 Health Care Financing Administration, "Report to Congress: Appropriateness of Minimum Nurse Staffing Ratios in Nursing Homes", August 2000. Available at www.hcfa.gov.

22 See e.g., *State of Minnesota v. Alterra Healthcare Corporation*, Clearinghouse No. 53,024 (Minn. 2000) (Minnesota Attorney General lawsuit against an assisted living facility based on allegations of understaffing and neglect). More information on this case is available at www.ag.state.mn.us. *Elder v. Fischer*, 717 N.E. 2d 730 (Ohio Ct. App. 1998) (Ohio SSI-eligible residents sued their residential care facility under their state UDAP statute, alleging that the facility had overcharged the residents); *Klein v. VIA Hotel Corporation*, 41 Cal. App. 4th 1133 (1996) (adult children sued a licensed residential care facility for wrongful death of their mother).

23 See generally Long-Term Care Advocacy § 10.06[1][a][i]. See, e.g., *Continued Care, Inc. v. Fournet*, 979 S.W. 2d 419 (Tex. App. 1998) (negligent supervision); *Barry v. Manor Care, Inc.*, 1999 U.S. Dist. LEXIS 5928 (E.D. Pa. 1999) (negligent hiring and training).

24 See generally Long-Term Care Advocacy § 10.06[1][b] et seq. See, e.g., *Barry v. Manor Care, Inc.*, 1999 U.S. Dist. LEXIS 5928 (E.D. Pa. 1999) (nursing facility resident struck by nurse aide); *Rodebush v. Oklahoma Nursing Homes*, 867 P. 2d 1241 (Okla. 1993) (nursing facility resident slapped by nurse aide); *Stiffelman v. Abrams*, 655 S.W. 2d 522 (Mo. 1983)

(nursing facility resident kicked and struck by employees); *Pounders v. Trinity Court Nursing Home*, 576 S.W. 2d 934 (Ark. 1979) (false imprisonment claim).

25 See generally Long-Term Care Advocacy § 10.06[1][f]. See, e.g., *Brown v. University Nursing Home*, 496 S.W. 2d 503 (Tenn. Ct. App. 1972); *McIntyre v. Transitional Health Services*, 1998 U.S. Dist. LEXIS 13965 (M.D.N.C. 1998); *Arenson v. Whitehall Convalescent and Nursing Home*, 164 F.R.D. 659 (N.D. Ill. 1996). But see *Stiffelman v. Abrams*, 655 S.W. 2d 522 (Mo. 1983) (court rejected a breach of contract cause of action based on the death of a nursing facility resident).

26 See generally Long-Term Care Advocacy § 10.06[1][g].

27 Claims to consider include defenses based on contracts of adhesion, duress, lack of capacity, and mandatory arbitration requirements. See generally UDAP manual § 5.2.3 (adhesion contracts), and § 7.7 (mandatory arbitration); Bruce Vignery and Stephanie Edelstein, *Litigating Long-Term Care Issues*, reprinted in National Consumer Law Center, 8th Annual Consumer Rights Litigation Conference materials (1999); Charles P. Sabatino, *Nursing Home Admission Contracts: Undermining Rights the Old-Fashioned Way*, 24 *Clearinghouse Rev.* 553 (1990).

28 Unconscionability can be a defense to contract enforcement. Some states also have separate unconscionability statutes allowing for affirmative claims. See UDAP manual §§ 3.3.4.4 and 4.4; National Consumer Law Center, *The Cost of Credit: Regulation and Legal Challenges* § 11.6 (1995 and Supp.).

Note: This Consumer Concerns reflects the current law only. Advocates should research the law since there are likely to be changes after this publication.

A publication of NCLC's National Legal Resource Initiative for Financially Distressed Older Americans
National Consumer Law Center - 77 Summer St., 10th Fl.- Boston, MA 02110 -
617/542-8010

September 2000