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A New Strain of “Super Suits”

By Patrick B. Curran
and Julie M. Bargnesi

Defense attorneys across the country must come together to develop cogent, compelling responses to these cases.

Nursing Home Class Actions 101

Class actions have hit home in the heartland—nursing homes, that is. It was only a matter of time before creative plaintiffs’ attorneys expanded the nursing home litigation model developed in the southeastern United States and

took it to the next level. Over the past few years, individual nursing home lawsuits have morphed into a wave of class actions. These “super suits” do not have venues in major urban centers but in places such as Wisconsin, Minnesota, Arkansas, Colorado, Washington state, Eureka, California, and upstate New York.

Plaintiffs’ lawyers take full advantage of the class action provisions contained in patients’ rights statutes to file class actions on behalf of thousands of residents at once when the patients have suffered negligible or not a single injury. A jury verdict in the *Lavender v. Skilled Healthcare Group, Inc.*, class action in Eureka, California, captured the attention of all nursing home operators with a \$677.8 million dollar verdict.

In this article, we will review the emerging threat to nursing home enterprises nationwide from class actions and briefly survey jurisdictions where this trend has already run its course. A series of class actions in Buffalo, New York, provides

recent experience upon which to base observations on plaintiffs’ attorneys’ strategies and suggestions for defense attorneys, particularly those who may be more accustomed to defending individual cases rather than “super suits.”

Elements of a Class Action

In a class action one or more lead plaintiffs act as representatives for a defined class by asserting claims on behalf of all the class members. A named plaintiff typically files a lawsuit individually and on behalf of all those similarly situated. After the initial pleading phase, the named plaintiff must petition the appropriate court for class certification. The criteria that the named plaintiff must meet before a court will certify a class are numerosity, commonality, typicality, and adequate representation.

To fulfill the numerosity requirement, a named plaintiff must demonstrate that the number of class action plaintiffs is so numerous that joinder would be impractical.



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While the laws and rules governing class actions don't specifically require a minimum number of plaintiffs, case law suggests that the minimum number of plaintiffs ranges from 30 to 40 class members. Commonality requires that the class action involve common questions of law or fact affecting the proposed class members. The typicality requirement focuses on whether the claims

take a different tack by focusing on deficiencies that impact residential populations as a whole. They frequently target understaffing, as well as alleged inadequate food, delayed responses to call bells, and deprivation of dignity, all of which were previously considered "low value" claims. However, when aggregated, those claims have the potential to lead to huge damage awards.

While plaintiffs continue to pursue traditional, separate lawsuits against nursing homes, the emergence of class action litigation is a growing trend with enormous implications from both a legal and business perspective. This trend coupled with states' "patient rights" statutes, which establish an almost strict liability standard for defendants, generally imposes a lower burden of proof than traditional lawsuits. Defendant nursing homes are confronted with the difficult task of proving that they exercised all care reasonably necessary to prevent and limit the deprivation and injury for which plaintiffs assert defendants bear liability.

Courts have increasingly certified class actions in nursing home cases involving "patient rights statutes," which have broad application, a lower burden of proof, and usually include provision for attorneys' fees and punitive damages. Factor in the number of proposed class members and it becomes readily apparent how treacherous nursing home class action cases can be.

legislature. The sponsors' memorandum in support of the bill said that including a class action provision was necessary to create incentives for private parties to help protect the rights of nursing home patients. Possible attorneys' fees awards for plaintiffs' lawyers further encouraged private representation. By guaranteeing a minimum award of 25 percent of the average daily Medicaid reimbursement rate, the potential recovery in a lawsuit became large enough to "encourage the private bar to bring suits on behalf of nursing home patients." This occurred in an era when television advertising by lawyers was unethical and unthinkable.

Opponents of the class action provision said that it was more important to ensure that nursing homes provided adequate care in the first place rather than to encourage extensive litigation after people suffered damage. Since the plaintiffs' class would consist primarily of the aged, and the life of a class action generally extends over many years, it was highly probable that by the time a class action finally concluded, a sizeable percentage of the residents would no longer be living. Their heirs would maintain the cause of action thus defeating the internal logic of protecting aged residents. On August 6, 1975, Governor Hugh Carey signed New York Public Health Law §2801-d into law.

The New York Patients' Rights Statute
Public health Law §2801-d (1) states as follows:

§2801-d. Private actions by patients of residential health care facilities.

1. Any residential health care facility that deprives any patient of said facility of any right or benefit, as hereinafter defined, shall be liable to said patient for injuries suffered as a result of said deprivation, except as hereinafter provided. For purposes of this section a "right or benefit" of a patient of a residential health care facility shall mean any right or benefit created or established for the well-being of the patient by the terms of any contract, by any state statute, code, rule or regulation or by any applicable federal statute, code, rule or regulation, where noncompliance by said facility with such statute, code, rule or regulation has not been expressly autho-

Factor in the number of proposed class members and it becomes readily apparent how treacherous nursing home class action cases can be.

of the representative plaintiff are typical of the claims of the class. Finally, the named plaintiff, as the class representative, must be able to adequately represent the interests of the class members.

A court may certify a class when the court finds that the questions of law or fact common to the class members *predominate* over questions affecting individual members and a class action is superior to other available methods for adjudicating the controversy. A defendant's opposition to class certification is without a doubt the crucial battleground in the case.

Class Actions and Nursing Homes

A class action is a means of holding large institutions socially and ethically accountable for their actions. The legal system brings together plaintiffs who have seemingly suffered small injuries warranting small damages into a single lawsuit when the system otherwise would leave them without recourse due to the cost of litigation.

But in the context of long-term care facilities, class actions become potent weapons that can achieve shocking results. Historically, nursing home litigation has been conducted largely through individual lawsuits with claims focusing on pressure sores, falls, and inadequate care. Class actions

Origins of Nursing Home Class Actions in New York

Three catalysts led to a nursing home patients' rights statute in New York in 1975: a series of news reports, a Ralph Nader investigation, and hearings conducted by politically ambitious state Assemblyman Andrew Stein of Manhattan. His shrewd use of the media catapulted him to notoriety as he charged nursing homes with widespread Medicare and Medicaid bill padding. He held a press conference on the steps of the federal courthouse to announce that he was filing a class action on behalf of nursing home residents against the federal government. During public hearings, witnesses testified to dreadful conditions including dehydration infected bedsores excrement on the floor in patients' rooms, and a diarrhea epidemic caused by serving outdated milk, among others. As a result, a patients' rights bill was introduced in the

rized by the appropriate governmental authority. No person who pleads and proves, as an affirmative defense, that the facility exercised all care reasonably necessary to prevent and limit the deprivation and injury for which liability is asserted shall be liable under this section. For the purposes of this section, "injury" shall include, but not be limited to, physical harm to a patient; emotional harm to a patient; death of a patient; and financial loss to a patient.

New York Class Action—Fleming v. Barnwell Nursing Home

In New York's first nursing home class action, which began in 2001, *Fleming v. Barnwell Nursing Home and Health Facilities, Inc.*, 309 A.D.2d 1132 (N.Y. App. Div. 2003), the appellate division ultimately certified a class based on just two allegations in a 94-paragraph amended complaint: inedible food and inadequate heat. Pl. Am. Compl., Feb. 26, 2002, R. on Appeal, at 92.

The representative plaintiff sued on behalf of his mother who developed bed sores and subsequently died of septic shock. The plaintiff planned to sever the individualized medical malpractice claims from the grounds for class certification. His affidavit in support of certification referred to "squalid conditions" affecting other residents dressed in filthy clothing and wearing diapers filled with feces, urine-stained floors, and inadequate activities for mentally challenged residents. The plaintiff's attorney relied on a New York State Department of Health (DOH) Statement of Deficiencies citing a potpourri of violations that were not common to all the residents. For example, the statement mentioned failure to draw privacy curtains, failure to perform timely assessments of newly developed pressure sores, failure to provide individualized meaningful activities for cognitively impaired residents, and a five percent error rate in administering medication.

All of those incidents affected residents differently and sometimes not at all according to the defense attorney. Evaluating each individual's alleged injury would require a court to scrutinize each plaintiff's medical record. As such, the defense attorney argued, the residents were not similarly situated for purposes of class certification. The trial court rejected class certification.

The appellate division reversed citing the plaintiff's claims that the "food looked horrible" and his mother considered it inedible, and space heaters were used in areas of the facility which were cold. Those conditions constituted the common thread linking all residents to a violation of their dignity under §2801-d. The court denied certification of the negligence charge due to a lack of common question predominance, but it found that all residents *had been* affected by heat and food.

Fleming—What Does It Mean?

Obviously even classifying institutional food as "horrible" involves some subjective judgment. Whether someone characterizes a room temperature as too warm or too cold likewise depends on personal sensitivities. The *Fleming* record does not include evidence that other residents complained about the food or inadequate heat. The plaintiff's attorney supported the class certification motion with merely the plaintiff's

own 16-paragraph narrative affidavit. Other than the DOH Statement of Deficiencies, neither side offered much evidence affirming or refuting "squalid conditions." Neither appeared to paint a big picture of the nursing home, which would have helped, by offering DOH surveys over several years, establishing whether the nursing home corrected or ignored deficiencies or whether residents shared common grievances at resident council meetings, or if nursing home employees made efforts to serve wholesome food, keep residents clean, and maintain comfortable building temperatures.

The plaintiff alleged that the resident class had to endure "conscious pain and suffering" due to violation of patients' rights, but the appellate court record doesn't indicate how, if at all, the food or heat caused harm other than general discomfort, which raises these questions: what types and degree of harm would sufficiently constitute common "deprivation" of a right or benefit among class members to

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warrant a class action generating a mountain of litigation?

Only two issues survived for class treatment as a result of the appellate decision. While the trial judge rejected class certification completely, the higher court “split the baby” by denying certification on negligence while giving the class plaintiffs a ticket to pursue patient rights theories on

mately 32,000 facility residents. The lawsuit, filed in May 2006, alleged that the defendants willfully failed to maintain 3.2 nursing hours per patient per day as required by state statute, Health & Safety Code §1276.5. However, staffing levels over the class period were, in the aggregate, well over state requirements, the defense demonstrated, based on company financial records.

The lead defense lawyer said, “The defeat was the result of a perfect storm of legal inequities left un-tempered by the protective arms of judicial review.” Kippy Wroten, *The Lavender Trial: Understanding the Loss in Humboldt, Part One*, Elder Law & Long Term Care newsletter, Wroten & Associates, Fall 2010. Another court in California dismissed an understaffing lawsuit in *Alvarado v. Selma*, 153 Cal. App. 4th 1292 (Aug. 1, 2007), finding that calculating staffing ratios was a task better accomplished by an administrative agency. Wroten, *supra*. The *Lavender* trial judge “rejected the wisdom of the *Alvarado* ruling and instead exercised his discretion in favor of plaintiffs.” Wroten, *supra*.

In April 2010, as the *Lavender* trial was underway, another California judge ruled that the nurse staffing law was “merely ‘enabling legislation directing the Department [of Public Health]... to create’” regulations, which were never adopted. Wroten, *supra* (quoting *Fashing v. The Earlwood*). Nonetheless, the *Lavender* trial proceeded for nearly six months focusing on the statute. Despite numerous objectionable rulings throughout the trial and filing a mistrial motion based on juror misconduct, which the court denied, the defendants were cornered into settling because the cost of posting a \$1 billion-plus appeal bond was prohibitive. And the company may have faced bankruptcy if the verdict stood. Thus, the case settled for \$62.8 million on September 8, 2010. Paul Elias, *Huge Verdict Shakes Up Nursing Home Industry*, Associated Press, Aug. 29, 2010, available at http://www.msnbc.msn.com/id/38904304/ns/business-us_business/t/huge-verdict-shakes-nursing-home-industry/ (last visited Sept. 6, 2011).

Three judges in three different cases arrived at three different rulings based upon the staffing statute, leaving nursing homes without guidance on what the law required. Wroten, *supra* (“How can the judicial system justify punishing any

company when the law itself defies consistent interpretation amongst the judges themselves?”).

Meanwhile, the plaintiffs’ attorneys in Buffalo, New York, were closely monitoring the trial in Eureka. They filed an individual nursing home lawsuit in April 2010, but recast it as a class action and served the entire nursing home chain and owner the day after the *Lavender* verdict. Subsequently, they filed two more class actions, all against proprietary nursing home chains.

Class Actions Across the Nation

As mentioned, plaintiffs’ attorneys have attempted to obtain class certification for nursing home actions in various jurisdictions throughout the country with various results. Following is a sample of notable cases.

Colorado—1998

The court in *Kohn v. American Housing Foundation, Inc.*, 178 F.R.D. 536 (D. Colo. 1998), denied class certification finding that because the liability of the defendants could not be determined without findings on causation and harm, “the common question of adequacy of care and environment [did] not predominate.” The plaintiffs alleged that the defendant provided substandard care in violation of state and federal statutes asserting that the defendant understaffed and failed to adequately invest capital and resources. As part of plaintiffs’ evidence they submitted affidavits, testimony, and documentary evidence that showed that the standard of care required 3.5 nursing hours per patient per day, and the defendant only provided 1.6 to 2.25 such hours. Incident reports revealed that patients were not adequately supervised or attended, and a large number of falls happened. The defendant successfully challenged the plaintiffs’ proof by providing the Colorado Department of Health surveys. In addition, the defense produced its own evidence that conditions were not substandard. The plaintiffs sought certification on the issue of liability only, but the court found it inappropriate to separate liability from causation and damages. Thus, the court denied the plaintiffs’ motion for class certification.

Arkansas—2007

In *Beverly Enterprises-Arkansas, Inc. d/b/a*

Aggregating all residents

of commonly owned facilities over the course of a three-year statute of limitations period can easily involve thousands of potential class members.

two narrow grounds. The result was the same. The *Fleming* litigation dragged on for nine years. The class action on behalf of the 242 class members settled for \$950,000. Each of the 242 class members, assuming that no other class members came forward, would receive \$2,169, while the plaintiffs’ attorneys received \$425,000. Even after the settlement was reached, the plaintiffs’ attorneys became embroiled in a dispute with their former clients over fees. Thus, the defendant paid a settlement, class members received a small claims court size payment, and their lawyers devoted thousands of hours over the course of a decade to the case, which raises another question: Who won the war?

California—*Lavender v. Skilled Healthcare Group, Inc.*

The largest verdict in a nursing home class action was awarded by a jury in Eureka, California, on July 7, 2010. The amount was \$677.8 million. The plaintiffs in *Lavender v. Skilled Healthcare Group Inc.*, No. DR060264 (Calif. Super. Ct. Humboldt Co.) accused an Orange County-based provider of understaffing its 22 nursing homes. The plaintiff class was comprised of approxi-

Batesville Nursing and Rehabilitation Ctr. v. Thomas, et al., 259 S.W.3d 445 (2007), the complaint alleged claims of medical malpractice, negligence, breach of contract, and violation of Arkansas' Residents' Rights Act on behalf of an estimated 489 class members. In granting certification, the lower court excluded the personal injury and medical malpractice claims from the class certification. The Arkansas Supreme Court affirmed the lower court's class certification for the statutory and contractual claims only.

On appeal, Beverly relied on *Kohn v. American Housing Foundation, Inc.*, 178 F.R.D. 536 (D. Colo. 1998), denying class certification because the federal district court found that common questions of law and fact did not predominate over individual issues. However, in affirming the trial court, in *Beverly* the Arkansas Supreme Court distinguished the *Kohn* case from *Beverly* noting that the *Kohn* court used the "rigorous analysis" under Federal Rule of Civil Procedure 23 but Arkansas did not require that analysis. Interestingly, the Arkansas Supreme Court found the *Fleming v. Barnwell Nursing Home & Health Facilities, Inc.*, 309 A.D.2d 1132, 766 N.Y.S.2d 241 (2003), decision more persuasive.

Following certification, the defense started a blitzkrieg by deposing hundreds of class plaintiffs, mostly residents' relatives. Teams of lawyers conducted 30 depositions per day. One-third of the plaintiffs detested the nursing homes, but the other two-thirds were pleased with them or were neutral. Afterward, the defense moved to de-certify the class and won. On appeal, the court found that the plaintiffs' interests and damages lacked commonality. The parties began confidential settlement discussions, which resulted in an extremely favorable outcome for Beverly.

Wisconsin—2008

In *Jones v. Extencicare Health Services, Inc., et al.* 11/14/08 (Case No. 20008CV016472, Milwaukee County Circuit Court), the plaintiffs alleged false advertising and purposely admitting acutely ill residents without hiring adequate staff. They also alleged that Extencicare violated Wisconsin's Consumer Protection Act. The Circuit Court judge dismissed the class action lawsuit because the allegations were not specific.

Washington—2009

In *Steele, et al. v. Extencicare Health Services, Inc., et al.*, 607 F. Supp. 2d 1226 (W.D. Wash. 2009), short-term nursing home residents filed a class action complaint alleging violations of the Washington Consumer Protection Act (WCPA) and specifically that the defendants did not operate its facilities in accordance with their representations and advertisements. The complaint's sole cause of action was the violation of the WCPA. The defendants removed the action to federal court and filed for a summary judgment on the grounds that the plaintiffs did not meet several requirements of their WCPA claims.

To establish a claim for a WCPA violation, a plaintiff must prove an unfair or deceptive practice caused injury to the plaintiff in his business or property and that the injury has a causal link to the unfair or deceptive act. The defendants argued that the plaintiffs failed to prove injury to the plaintiffs' business or property and to establish the causal link. The plaintiffs only mentioned emotional distress and psychological harm as the injuries, which did not meet the statutory definition of injury. The court found that even if the plaintiffs could have shown that they suffered an injury as defined by the WCPA, they did not meet their causation burden. Based on deposition testimony of the plaintiffs, it became clear that the defendants' advertising was not a factor in the plaintiffs' decision to stay at the defendants' nursing homes and, therefore, did not cause any of the alleged harm. Thus, the district court found that the residents did not suffer injuries covered by the WCPA, and the residents also failed to prove causation. The court granted a summary judgment dismissing the complaint.

Minnesota—2009

Similarly, in *Bernstein, et al. v. Extencicare Health Services, Inc., et al.*, 653 F. Supp. 2d 939 (D. Minn. 2009), the class action alleged violations of several of Minnesota's consumer protection statutes. The district court rejected all of the class actions' claims and dismissed the case for failure to state a cause of action because the plaintiffs' claims were too general to serve as a basis for claims.

Louisiana—2010

In the Louisiana case of *Rivers, et al. v. Chal-*

mette Medical Center, Inc., et al., 2010 WL 2428662 (E.D. La. 2010), the court denied the plaintiffs' motion for class certification stating that the plaintiffs had failed to satisfy the requirements of typicality, predominance, and superiority. The plaintiffs were various relatives of deceased or injured patients of the defendants, Chalmette Medical Center, Inc. and Universal Health Services,

Just as plaintiffs' attorneys' are highly creative in class action cases, the best defenses are crafted by aggressive imaginations.

Inc., who died or were injured following Hurricane Katrina in 2005. It was alleged that Chalmette and Universal failed timely to evacuate the facility, causing death or injury. The plaintiffs initially named Ronald Rivers and Ly Dao as class representatives. Ly Dao sued on behalf of her parent, Nhan Dao, who was evacuated from Chalmette and passed away weeks later. The court found the Nhan Dao-based claims individualized and atypical of the class members. The predominance standard is a rigorous standard, and the court found that common questions of law or fact did not predominate over the many questions affecting individual class members. The court found that certifying a class with significant differences among its members would render the class ineffective.

Plaintiffs' Attorneys' Strategies in Class Actions

Once a court grants class certification, the game may be over. It becomes a game of multiplication. Aggregating all residents of commonly owned facilities over the course of a three-year statute of limitations period can easily involve thousands of potential class members. A defense team must collect rooms full of paper, organize it, review it, and digest it. Teams of lawyers and paralegals must devote unlimited hours to exhaustive research and discussions to formulate strategy. Such



an approach is anathema to lawyers strictly following litigation guidelines, as well as to insurance carriers because the resulting bills induce immense sticker shock because lawyers directing the litigation cannot comply with traditional billing guidelines. A judge's order certifying a class triggers all this. When that happens, your opponents have successfully realized their first strategy.

A defense attorney should confront head-on whether prospective plaintiffs sustained any injuries at all as part of a motion to dismiss in lieu of an answer.

How much difficulty do plaintiffs' attorneys have persuading judges to certify a class action? If an attorney representing plaintiffs merely alleges commonly experienced harm among plaintiffs in a complaint, the attorney may convince a judge to certify a class. Judges consider the merits of complaints later in litigation when litigants conduct fact-based discovery. For the purposes of a class certification motion, all that matters is whether there appears to be a common thread among a large group of unrelated individuals. Generally, for plaintiffs, saying it's so makes it so.

Filing in State Rather Than Federal Courts
State courts are the favorite destination of plaintiffs: "They want to stay in state court as much as they possibly can because they can get more provincial juries and the judges may be a little bit more lenient." Gwen Mortiz, *Wilkes & McHugh Test New Practice Area in Arkansas*, Arkansas Business Journal (July 7, 2003) (quoting Roger Glasgow discussing defending clients involved in class actions), available at <http://www.wilkesmchugh.com/wilkes-mchugh-test-new-practice-area-arkansas.html>. Federal courts more rigorously analyze the elements of class actions that cases must have before certifying class actions, and they

closely scrutinize the scientific basis of experts' opinions. Federal court juries tend to be more conservative as well.

Drive a Wedge Between Employer and Employee

Naming individual nursing home employees as defendants can drive a wedge between them and their employers and defense attorneys. Someone can become unnerved after seeing his or her name in a lawsuit caption. Some certified nurses' aides may not have a great sense of company loyalty to begin with, but the threat of bearing personal financial responsibility to plaintiffs could send them running to opposing counsel to cooperate. Many staff members feel overworked, underpaid, and grossly underappreciated. Some may feel "burned out" and cynical toward both nursing home residents and the facilities. Others may feel sympathetic toward residents and share their frustration over the staffing decisions.

When a lawsuit caption names defendants "John Does" and means all employees working for a facility during a particular time period, those workers may feel terrified that their identities will appear in the legal papers. Defense counsel must work closely with facility supervisors to convey a reassuring message to the staff that they do not face personal liability and will be fully protected if they need legal representation.

Using Inflammatory Language

A television screen can magnify the power of words if plaintiffs' lawyers vilify nursing homes for what they characterize as "abuse and neglect" when those words are accompanied by visual images of lonely, emaciated seniors in wheelchairs. Nursing homes are not popular institutions in general. Reports of residents being beaten, slapped, humiliated and left alone in soiled, smelly hospital gowns were what ignited the passion to reform the industry 35 years ago. Surely, such conduct warrants severe responses whenever it occurs. But the reality is that nursing homes have vastly changed for the better since patient rights statutes took hold. Generally what we face today as examples of "abuse" are often trivial incidents described in demonizing language.

The motion for class certification in *Fleming v. Barnwell Nursing Home* is based on an affidavit prepared for the plaintiff,

Fleming, which contains the following statements:

These people were at the mercy of their caregivers, as was my mother. The defendant Barnwell was entrusted with families, such as my own, with the task of affording care to those afflicted in ways that prevented them from caring for themselves. Instead, defendant Barnwell violated this trust in the most egregious way, disregarding the sanctity of the lives of those poor souls. The facility was little better than a warehouse apparently existing with the singular purpose of collecting money from these people, their families, or government agencies.

Jon Richard Flemming (sic) affidavit dated February 26, 2002, paragraph 15.

In reality, his mother did not have a space heater when her room was chilly; the plaintiff thought that the food "looked horrible," and his mother did not like it; the building was not clean as evidenced by apparent urine stains on the floor; and residents dressed in filthy clothing, all of which the plaintiff thought qualified as "dismal and disgraceful conditions." In these cases, whether an instance of subpar living conditions constitutes "abuse" may depend upon the words chosen by those who frame the accusations.

Damages

Under New York's patient rights statute, remedies are cumulative and not exclusive. Upon finding that class patients have been deprived of a right or benefit, §2801-d (2), provides that "Compensatory damages shall be assessed in an amount sufficient to compensate such patient for such injury, but in no event less than 25 percent of the daily per-patient rate of payment established for the residential health care facility... for each day that such injury exists." In addition, patients may recover punitive damages if the deprivation was willful or done in reckless disregard for the lawful rights of patients.

In a class action in New York, 25 percent of the daily per patient rate is multiplied by the number of patients who resided in a facility, then that amount is multiplied by the number of days or years permitted by the statute of limitations. The calculation produces astronomical results, but appar-

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Class Actions, from page 50
ently that is precisely what the New York legislature had in mind in 1975.

Innovative Approaches to Defending Class Actions

Just as plaintiffs' attorneys' are highly creative in class action cases, the best defenses are crafted by aggressive imaginations. Some possible approaches for defense attorneys to consider follow.

Filing a Motion to Dismiss

A motion to dismiss in lieu of an answer can narrow the issues, jettison unnecessary parties, eliminate baseless causes of action, elicit information from plaintiffs' counsel, and focus a court's attention on the weaknesses in the plaintiffs' pleadings. A plaintiffs' attorney's shotgun approach to formulating theories of recovery may exceed the applicable statutes of limitation. When does a particular claim period begin and end? Should a different named plaintiff represent residents of each nursing home? Causes of action may be duplicative or simply without merit.

Filing a Motion to Sever

Would multiple defendants fare better if each facility in a chain became the sole defendants in separate class actions? Are several smaller class actions preferable to a large one? A motion to sever may accomplish this. On the other hand, would multiple actions produce inconsistent outcomes? Would severing only lead to multiple chances to lose?

Presenting an Affirmative Defense— All Care Reasonably Necessary

Defense counsel needs to take full advantage of a statutory affirmative defense, if available, such as New York Public Health Law §2801-2 (1), which specifies that a facility "shall not" be held liable if it *pleads and proves that it exercised all care reasonably necessary to prevent and limit deprivation and injury*. In crafting a defense, an attorney should compile every possible example of what staff did right. Affidavits from supervisors in various departments could explain, for example, how staff administers medications, prepares meals, performs cleaning.

At the same time, consider what is *unnecessary* or what is unreasonable to

expect of a nursing home. It is unreasonable to expect that residents will receive virtually one-to-one nursing care 24 hours per day. Nursing homes are homes, not hospitals. It is unreasonable to expect that none of the residents will ever suffer the indignity of urinary or fecal incontinence from time to time. Many residents have multiple medical problems and rapidly deteriorating health, which cannot be reversed or retarded.

Confronting Injury Head-On

How is a resident injured by a slow response to a call bell, or a cold meal, or a bedroom that is too hot or too cold? If an injury is not physical, is it emotional or financial? A defense attorney should confront head-on whether prospective plaintiffs sustained *any* injuries at all as part of a motion to dismiss in lieu of an answer. Raising the issue at the outset alerts a judge that this is a significant battleground. Without injury, plaintiffs cannot sustain actions for deprivation of rights or negligence.

Residents who sustain actual injuries such as fractures or ulcers would be better off filing their own lawsuits because they could potentially recover more than through a class action. A class action is not the superior approach for them. Fractures and ulcers are individualized injuries. Circumstances and causes are different. Patients' underlying medical conditions differ. Personal injuries are indeed personal, and thus those plaintiffs could not demonstrate commonality. If this debate does not occur in a motion to dismiss in lieu of an answer, a defense attorney surely must pursue it in opposing class certification.

Nixing the Pattern of Actual Harm Argument

In New York, state Departments of Health surveys rank deficiencies from A to L, depending on the pervasiveness of a problem and the extent of harm that resulted, if any. The grid, above right, can help attorneys visualize the ranking of deficiencies as they pertain to the logic of class certification.

If a facility is as dreadful as plaintiffs allege, it stands to reason that survey results would reflect deficiencies in terms of both severity and frequency. The survey process is extremely thorough and is conducted by government investigators whose

Ranking of Deficiencies

	Isolated	Pattern	Wide-spread
Life-threatening	J	K	L
Harm to life-threatening	G	H	I
Possible harm	D	E	F
No harm	A	B	C

mission is to find fault during routine and unannounced inspections. If something is amiss, a government investigator will find it. Plaintiff attorneys often trumpet the high number of violations cited by state surveys but downplay the degree of severity or the number of residents affected.

The "isolated" column in the grid above would include problems that affected individual residents or occurred rarely. "Isolated" problems do not constitute a class of plaintiffs and do not prove commonality. Closely examining actual deficiencies may demonstrate that staffing had nothing to do with many of them. The two bottom rows in the grid relate to deficiencies involving no harm. Possible harm does not mean actual harm. Only the upper two rows of the grid indicate actual harm.

Thus, only the shaded boxes "H," "I," "K," and "L" warrant possible class certification, and only after a carefully analyzing each deficiency to determine whether it relates to staffing or another factor common to all plaintiffs. By scrutinizing survey results in this way, an attorney may be surprised to learn how infrequently deficiencies commonly could apply to all plaintiffs.

Addressing Understaffing

Plaintiffs' common denominator generally is "understaffing." Facilities may have sufficient nurse hours per day, but plaintiffs frequently criticize the time and location allocation. A defense attorney should emphasize how many employees in addition to nurses provide care to residents in each day. Certified nurse's aides, dieticians, therapists, recreational assistants, social workers, "feeders" in a dining room, and others spend time with residents on a regular basis.

Settling Early With the Named Plaintiff

Offering a preemptive settlement to the named plaintiff could conceivably end a

lawsuit before it begins. For example, if a reasonable sum was offered to a single lead plaintiff who had questionable injuries, he or she would face a dilemma. How could he or she decline more money than he or she could hope to recover as part of a class? Why should he or she wait years for a class action to run its course when he or she could receive a check within weeks? Would the class action attorney who persuaded him or her to lead the class have a conflict of interest advising him or her whether to accept the offer? Would substitute plaintiffs have weaker and less sympathetic claims than the first-line plaintiff? Even if a named plaintiff summarily rejects a settlement of-

fer, does it serve as a benchmark by which the class plaintiffs will compare their ultimate recovery? In that case, it costs a defendant nothing but may cause some conflicts for the plaintiffs and their counsel.

Conclusion

A new generation of massive, menacing lawsuits has emerged in very ordinary venues across the country. Class actions have cross-pollinated with health care malpractice litigation involving a growing elderly population. This new strain of “super suits” may prove to be the MRSA-equivalent of “tort reform-resistant strategies of attorneys.” The trend may spread in response

to limitations on other types of personal injury cases and the success enjoyed by plaintiffs’ attorneys thus far in the earliest nursing home class actions.

Defense attorneys across the country must come together to develop cogent, compelling responses to these cases. Otherwise, we will have little chance to defend them and will have to capitulate to escalating settlement demands. Insurance carriers will become unwilling to insure these providers, and nursing homes will become unwilling to accept the risk of providing care. If that happens, we will have nowhere to live and no one to care for us when we are too old and infirm to defend ourselves. **FD**

Discipline, from page 24

Once a board files a formal complaint against a physician, the fact that the formal complaint has been filed by the board generally becomes public information in states such as Maryland, Rhode Island, New Hampshire, New York, Massachusetts, and Maine. Md. Code Ann. §14-411 (2011); N.H. Rev. Stat. Ann. tit. XXX, ch. 329:18; R.I. Gen. Laws §5-37-5.2 (2011); N.Y. Pub. Health Law §230; 243 Mass. Code Regs. 1.02; Me. Rev. Stat. Ann. §8003-A. Not only do these states permit the public to know that a formal complaint has been filed against a physician, but the public may know the charges, upon a vote of the committee. N.Y. Pub. Health Law §230.

Any proceedings held after that are subject to the states’ Administrative Procedure Acts, which means that hearings are open to the public, the final determination is public, and documents introduced into the proceedings, such as a complaint, are public. Code of Ala. §34-24-361.1 (2010);

Cal. Bus and Prof Code §495 (2011); Kan. Stat. Ann. §65-2898a; Mass. Code Regs. 102; Mich. Admin. Code r. 338.1627 (2011); Minn. Stat. §147.01 (2010); N.H. Rev. Stat. Ann. tit. XXX, ch. 329:18; N.Y. Pub. Health Law §230; R.I. Gen. Laws §5-37-5.2; R.I. Gen. Laws §5-37-5.2 (2011); Tenn. Code Ann. §63-6-214 (2010); Wash. Rev. Code, §18.130.110. Thus, even if a board files a formal complaint against a physician but later dismisses or resolves the action without adjudication, the closed complaint files, which contain the complaint and other information, are still, in some states, part of the public record. 243 Mass. Code Regs. 1.02; Me. Rev. Stat. Ann. §8003-A; N.Y. Pub. Health Law §230.

Recently, in Rhode Island, a physician was disciplined for posting confidential information on Facebook. The physician was found guilty of unprofessional conduct after posting information about her emergency room experiences. Although the patient’s name was not posted, the board

believed the physician posted enough information to reveal the patient’s identity.

Conclusion

Although the reasons for disciplining physicians have not changed, a new level of regulation has evolved. Nothing indicates that the trend among states toward disclosing more disciplinary information than in the past about physicians will reverse. As some people increasingly view professional medical services as consumer commodities, the public will continue to demand information about the quality of those services. Regulators seem happy to meet this demand by requiring it from health care professionals. The challenge is to insure that whatever information is disseminated is, in fact, accurate. Professionals and their attorneys will need to remain vigilant about the information that they provide and how it is interpreted and published because inaccurate or misleading information can have significant negative consequences for physicians. **FD**

Global Law Firms, from page 70

and religion are also receiving more attention in professional circles, as lawyers in various countries begin to confront the complex legacies of colonialism, immigration, and internal ethnic division. From the little that has been published about these issues, it appears that many countries around the world have made even less progress than the United States in integrating women and minorities into the corporate bar. Michael St. Patrick Baxter, *Black*

Bay Street Lawyers and Other Oxymora, (1998) 30 Canadian Business LJ 267. More fundamentally, experience with globalization to date makes it abundantly clear that no country, system, or profession—no matter how powerful or successful—can expect to impose its vision on the world, at least not for very long. America in the twentieth century was remarkably successful in exporting its institutions and practices to other countries, leading some—at least some in the United States—to pro-

claim the last 100 years as the “American Century.”

The United States’ 30-year struggle to integrate women and minorities into the corporate legal sector is a microcosm of the larger project. Global law firms would do well to study its lessons—both the success and the failures—as they embark on the complex task of building stable, competitive, and sustainable professional organizations for a multicultural and boundaryless world. **FD**