



AALNA Section

Assisted living lawsuits: An ounce of prevention is worth a pound of cure

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As the population across the country ages, assisted living continues to grow in popularity. Resident care litigation risk has been emerging with more frequency as the mission and vision of assisted living communities evolve. Aging in place is a central philosophical aim of the assisted living movement as the acuity levels of residents are higher and needs are increasing through the residency. As in nursing homes, accidents or clinical problems at assisted living centers can translate into liabilities. We have been experiencing an increase in lawsuits across the country against assisted living communities including against individual assisted living nurses. Plaintiff's attorneys are now targeting assisted living communities after decades of focusing attention on nursing homes. Plaintiff's attorneys have a "nursing home lawsuit" playbook in hand that they are using on the field against assisted living communities. What do you and your facility need to know? How can you be proactive with risk management and quality assurance? In this article, we will explore the characteristics of the assisted living industry that have interested Plaintiff's attorneys; provide an overview of the anatomy of an assisted living lawsuit; identify the main claims presented in the lawsuits; and present a few considerations for proactive risk prevention.

1. Why is the assisted living industry being targeted by Plaintiff's attorneys?

Plaintiff's attorneys see assisted living facilities rapidly becoming the nursing homes of the future and suited for the litigation model they developed over the past decades. According to the National Center for Assisted Living, there are over 36,000 licensed assisted living facilities nationwide with an estimated one million residents making their home in assisted living/residential care communities, including about 131,000 receiving assistance under the Medicaid program. Assisted living is the long term care option preferred by many individuals and their families because of its emphasis on resident choice, dignity, and privacy as assisted living continues to grow while adapting to changes in consumer wants and needs.

As far as Plaintiff's attorneys view, assisted living facilities tend to aggressively market and recruit residents, many times promising staffing levels or services that, in reality, are not available. In an attempt to compete with nursing homes, assisted living facilities are accepting patients with higher acuity including advanced Alzheimer's disease and cognitive impairment. The nursing home understaffing theory is then pursued with the argument that the assisted living facilities have staffing that is inferior to the staffing levels present in nursing homes and simply cannot meet the needs of the higher acuity residents. Plaintiff's attorneys capitalize on industry data such as the December report from the Office of Inspector General of the U.S. Department of Health and Human Services documenting deficiencies in meeting state and federal requirements for assisted living communities providing Medicaid services. There have also been media reports about abuse and neglect in assisted living communities.

The assisted living industry shares many of the characteristics of the nursing home industry from the early 1990's when nursing home companies were targeted as defendants in lawsuits. Assisted living has been an untouched industry for many years and the industry is populated with large corporations. The residents' needs are higher with recent reports showing that 37% of residents were receiving assistance with three or more ADLs; 42% had Alzheimer's disease or other dementias; 39% provided skilled nursing services by RNs or LPNs and 13% of residents received these services; and 19% of residents received Medicaid funding. Statistics also show that 33% of the residents die in the assisted living facility and 59% are transferred to a long term care facility. In 2011, 16 states reported making statutory, regulatory, or policy changes impacting assisted living/residential care communities. Overall, there is greater exposure to legal risk when an event occurs at an assisted living community similar and Plaintiff's attorneys are profiteering.

2. What is the anatomy of an assisted living lawsuit?

The basis for an assisted living lawsuit is whether the assisted living facility breached regulatory or community practice standards related to a specific event (fall or other incident) or set of clinical conditions (development of pressure sores, UTIs, decline in

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functional status) during the residency. The inquiry is, in most cases, whether the facility accepted the resident for admission when the resident's care needs required a higher level of care or the facility failed to properly assess the resident for changes in condition making continued placement unsuitable. As assisted living nurses, you have a multitude of responsibilities and play many roles. In the arena of litigation, the nursing oversight responsibility to assure timely identification of acute clinical problems and to optimally manage physical and behavioral problems becomes a focal point and serves as the basis for claims of direct liability against a nurse. A professional nurse in assisted living may have the responsibility for assessment of potential residents to determine their suitability and safety living in an assisted living environment as well as assessing change in condition to determine if a resident needs a higher level of care. Plaintiff's attorneys seek to establish that a nurse breached the duty owed to a resident by failing to fulfill these responsibilities that then resulted in an incident or development and/or decline in conditions.

Specifically in an assisted living lawsuit, a Plaintiff (the resident or the resident's representative) must establish a "prima facie case". A "prima facie case" is an action against an assisted living facility for injury to or death of a resident and must be established by proof of:

- A duty owned by the assisted living facility to the resident (and/or a specific duty owed by the assisted living nurse);
- The standard of care applicable to the assisted living facility governing its care of the resident;
- The breach of that duty by the assisted living facility (or the nurse), either by omitting to perform or by wrongly performing its duty to the resident;
- Damages (i.e., injury to or death to the resident); and
- A proximate causal relationship between the assisted living facility's breach of duty and the resident's injury or death.

There are several general defenses that are advanced by the assisted living facility, including:

- The assisted living facility (and/or nurse) conformed to the applicable standard of care;
- The resident's negligence was a factor contributing to injury or death;
- The resident assumed the risk that was the cause of the injury or death; and
- There is no proximate causal relationship between the assisted living facility's conduct and the resident's injury or death.

There are several parties that may be entitled to recover in the lawsuit including:

- A resident who suffered injury due to an assisted living facility's breach of duty;
- A resident who suffered injury due to an assisted living facility's breach of duty through a guardian, conservator, or next friend;
- The estate of a resident who died due to an assisted living facility's breach of duty; or
- A spouse or other person entitled to bring a loss of consortium (companionship) claim.

With respect to potential defendants who can be in the lawsuit, they include:

- The assisted living corporation or partnership;
- The owner, operator or management company of the assisted living facility;

- Individuals with ownership interest in the assisted living company; and/or
- An individual staff member whose conduct contributed to the resident's injury or death.

A lawsuit against an assisted living facility for injury or death to a resident may usually be brought in state courts of general jurisdiction and may also be brought in federal court if certain requirements are met. A lawsuit may also be brought pursuant to an enforceable arbitration agreement.

The plaintiff may be required to offer proof of the assisted living facility's standard of care and its breach of that standard through expert testimony. The state regulations, while serving as some evidence of the standard of care, are the minimum required for facility licensure. Plaintiff's attorneys also look to national and community standards of practices as well as the assisted living facility's policies and procedures. We will discuss the need to evaluate current policies and procedures and revise, if necessary, to comply with state regulations and facility practices as part of risk management and prevention.

The Plaintiff in the lawsuit may recover for medical expenses, pain and suffering, and other compensatory damages generally recoverable in personal injury or wrongful death actions. The Plaintiff may recover punitive damages where the defendant's conduct evidences a wanton disregard for the rights of the resident.

There are several theories of liability against an assisted living community. Specific Plaintiff's tactics are highlighted later in this article. Generally, we see the following theories of liability alleged:

- Common Law Negligence;
- Violations of the Consumer Protection Act;
- Violations of the Adult Protection Act or Vulnerable Adult Act;
- Negligent Hiring and/or Retention;
- Violation of Residents' Rights;
- Breach of Contract;
- Violation of State Regulations;
- Loss of Consortium;
- Wrongful Death; and
- Punitive Damages.

While each lawsuit is different and is based on individualized facts and state-specific regulations, they have similar characteristics. More and more, with Plaintiff's attorneys sharing information and conducting seminars on assisted living lawsuits, we are seeing the same prosecution models and playbooks used across the country.

3. What are the most common claims in an assisted living lawsuit?

Understanding the most common claims in an assisted living lawsuit (which are also the most frequent resident or family complaints), allows communities to create more proactive risk management and prevention programs, additional staff training, revised policies and procedures all which serve not only to reduce litigation risks but serve to enhance the quality of care and life of residents.

The events or conditions that most often form the basis of an assisted living lawsuit relate to:

- Falls
- Inconsistent, Incomplete or Erroneous Documentation
- Abuse (Physical and Sexual)
- Understaffing/Inadequate Staffing
- Failure to Transfer or Discharge
- Elopement/Wandering
- Failure to Supervise

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