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Making a Federal Case Out of It – Section 1983 Claims Against Nursing Homes

by Peter L. Gregory and Steven P. Aggergaard

In nursing home litigation, more plaintiffs are trying to make a federal case out of it by claiming damages for alleged violations of federal statutes, the United States Constitution, or both. The stakes are high because when 42 U.S.C. § 1983 is the basis, prevailing plaintiffs can recover attorneys' fees and state statutory damages caps do not apply.

Most often, plaintiffs cite § 1983 in tandem with the Federal Nursing Home Reform Act ("FNHRA"). Congress enacted the FNHRA in 1987 as part of the Medicaid Act to provide more oversight and inspection of nursing homes that receive federal funding. Because the FNHRA provides no private right of action, the question is whether one can be implied.

The vast majority of courts have answered "no," often granting Rule 12 dismissal. Among the most recent is *Liptak v. Ramsey County,* 2016 U.S. Dist. LEXIS 130761 (D. Minn. Sept. 23, 2016), which is on appeal to the Eighth Circuit. Reflective of the trend, *Liptak* cited the FNHRA and 42 U.S.C. § 1983, the latter of which creates a cause of action for claims against "state actors" who deprive the plaintiff of "rights, privileges, or immunities secured by the Constitution and laws."

Typically, § 1983 plaintiffs claim violation of constitutional rights such as the rights to free speech or due process. Protesters, prisoners, and persons subject to police officers' use of force are common plaintiffs. In the long-term care area, plaintiffs cite § 1983 to claim violation not only of constitutional rights, but also alleged federal statutory rights under the FNHRA.

Claims can be made against individual governmental employees, subject to immunity. "*Monell*" claims also can be made against the governmental entity itself when its policies or customs violate federal law.

So far, Plaintiffs have had limited success, including in *Liptak*. As Judge Ann D. Montgomery explained, the purely legal issue is whether Congress intended for the FNHRA to benefit individual litigants. Judge Montgomery found no such intent but acknowledged "a significant minority of courts, both district and circuit, have held that a plaintiff can sue by way of § 1983 for alleged FNHRA violations."

Those include the Third Circuit, which has held that the FNHRA was intended to benefit "Medicaid recipients" and therefore contained "rights-creating" language actionable under § 1983. *Grammer v. John J. Kane Reg'l Centers-Glen Hazel,* 570 F.3d 520, 527-28 (3d. Cir. 2009).

Grammer can be, and has been, distinguished. The Third Circuit incorporated language on congressional intent from a Second Circuit case, *Concourse Rehabilitation & Nursing Center Inc. v. Whalen,* 249 F.3d 136 (2d Cir. 2001), where the long-term care facility was the *plaintiff*. Arguably, the Second Circuit's language was dicta.

Numerous courts have rejected *Grammer,* the *Liptak* court among them. As the *Liptak* court explained, the FNHRA is Spending Clause legislation, which the Supreme Court rarely holds creates privately enforceable rights.

Courts considering a dispositive motion will carefully scrutinize the specific FNHRA statutes cited. In *Fiers v. La Crosse County,* 132 F. Supp. 3d 1111 (W.D. Wis. 2015), Judge James D. Peterson distinguished the cited statutes from other

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portions of the Medicaid Act for which the Seventh Circuit has found private causes of action, language that according to Judge Peterson "more directly conferred a federal right on Medicaid beneficiaries."

At the time of *Fiers,* around eight district courts in six circuits had ruled that the FNHRA did not provide a basis for an individual litigant's claims via § 1983 or directly. After *Fiers,* at least seven more district courts in six circuits have done so, typically distinguishing *Grammer*.

With *Grammer* the controlling authority, long-term care facilities in the Third Circuit are most at risk for defending FNHRA-based claims. District courts in the circuit have rejected them, but not necessarily on grounds *Grammer* was wrongly decided.

In *Hope v. Fair Acres Geriatric Center,* 2016 U.S. Dist. LEXIS 96421 (E.D. Pa. July 25, 2016), the claim failed because the court rejected the theory of *Monell* liability for alleged failure to hire "competent staff members" and to train them.

In *Watson v. Sunrise Senior Living Facility, Inc.*, 2015 U.S. Dist. LEXIS 93962 (D.N.J. July 17, 2015), the claim against the private facility failed for lack of state action, a result that parallels Supreme Court precedent holding that long-term care facilities do not become state actors simply because they are regulated or receive public funds. *Blum v. Yaretsky,* 457 U.S. 991 (1982).

Still, the flexibility of the state-action test has invited litigation, including outside the Third Circuit. Private facilities that depend heavily on public funding, and that provide services in tandem with the government, are most at risk for defending claims based on state action. *See, e.g., Baum v. N. Dutchess Hosp. & Wingate of Ulster, Inc.,* 764 F. Supp. 2d 410 (N.D.N.Y. 2011); *Taormina v. Suburban Woods Nursing Homes, LLC,* 765 F. Supp. 2d 667 (E.D. Pa. 2011).

Apart from FNHRA-based claims, the Due Process Clause might be implicated in cases involving egregious facts, a pattern of injury at the facility, or both.

In *Liptak,* the resident on a diet of pureed food died at a hospital after choking on an Easter dinner of non-pureed ham, potato, and a roll. A state investigation showed 10 other such residents received similar Easter meals. The wrongful-death trustee sought § 1983 damages based on the FNHRA but also the Fourteenth Amendment, alleging the county-owned nursing home deprived her of her "life, liberty, or property" and therefore her substantive right to due process.

Judge Montgomery explained that generally the Due Process Clause does not impose a duty to protect but identified two exceptions: in custodial settings when the state has limited a person's ability to care for herself, and when the state affirmatively places a person in danger. The court ordered Rule 12 dismissal because there was no allegation that the resident was at the facility against her will, and because the alleged dietary error was not reckless or malicious.

That latter theory of liability, based on alleged recklessness or maliciousness, remains a danger point for counsel defending long-term care facilities, including in the Eighth Circuit. In *Tinder v. Lewis County Nursing Home District,* 207 F. Supp. 2d 951 (E.D. Mo. 2001), the court denied Rule 12 dismissal while finding it plausible that the facility had created a danger where a resident fatally beat another resident.

Recently however, most courts have held that mere negligence or mistaken treatment does not rise to the level of a substantive due process claim. *See Brown v. Mt. Grant Gen. Hosp.*, 2015 U.S. Dist. LEXIS 120555 (D. Nev. Sep. 9, 2015); *Buerhle v. Hahn*, 2014 U.S. Dist. LEXIS 4301 (E.D. Pa. Jan. 14, 2014).

Counsel who litigate in the long-term care area await further appellate guidance, particularly in the Eighth Circuit.

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