

White Paper on Preparing For & Surviving The Class Action Tsunami Aimed At The Senior Housing & Care Industry

The Origin & Cause

In 2010, a California jury returned a \$671 million verdict in a class action alleging "violation of the rights of residents" under the California Health and Safety Code^[1] arising from alleged understaffing at senior care facilities. Before the jury determined whether to award punitive damages, the *Lavender, et. al. v. Skilled Healthcare Group, Inc.*^[2] lawsuit settled. Subsequently, the lead plaintiffs' attorneys in *Lavender* systematically sued all of the larger for-profit Nursing Home providers in the State of California seeking class action certification and substantial damages. All of these cases have now settled.

These same plaintiffs' counsel, and now others, are making the rounds among Assisted Living Communities, licensed as RCFEs in California. But because the Health & Safety Code provision that provided the vehicle for a massive recovery in *Lavender* – § 1430(b) – is inapplicable to Assisted Living Communities^[3], plaintiffs now pursue their claims under the Consumer Legal Remedies Act ("CLRA").^[4] Broadly, these new putative class actions allege deceptive business practices – specifically, regarding the quality of care and services facilities are providing. These suits seek damages, disgorgement/restitution of monies paid, injunctions and punitive damages.^[5] Senior-citizen class members may be awarded additional damages of up to \$5,000.^[6] Plaintiffs' counsel who are able to obtain class certification, or who threaten class certification and effectuate a settlement, are entitled to reasonable attorneys' fees, which usually amount to a sum equal to 25-33% of the monies paid; in other words, fee awards typically range from \$1 million to \$3+ million. Additionally, some of the newly minted threatened class actions against Senior Housing & Care Providers now include claims for violation of the Americans with Disabilities Act, as well as other creative claims.

Coverage Options

Two potential policies which may provide coverage for these new class actions are Directors & Officers/Management Liability Policies and Professional/Errors & Omissions Liability Policies. A company's commercial general liability coverage/policy should also be reviewed for potential advertising injury coverage depending on the allegations in the Complaint and whether such

by Linda E. Klamm & Samantha D. Wolff



coverage/policy excludes coverage for claims of residents. Because it is impossible to predict whether, when, and in what form a class action may be threatened against a Senior Housing/Assisted Living provider, it is imperative to work with your broker when placing and renewing coverage to obtain the broadest coverage commercially available to your organization. Please be mindful that certain types of claims for disgorgement, restitution and punitive damages will not be covered under any policy since California law bars coverage for these types of damages.

Further, many Professional and/or Errors & Omissions Liability Policies restrict coverage to bodily injuries of residents. However, most CLRA class actions do not allege such bodily injury claims because such claims – which are considered individual as to cause, type, and severity of injury – are individualized and thus do not meet the criteria of "commonality" necessary for class certification. Consequently, allegations of bodily injury are not alleged by experienced plaintiffs' class counsel in a putative class action. Additionally, endorsements and limitations precluding coverage for class actions should be avoided. Finally, when placing coverage, please keep in mind that class actions are expensive to defend and settlements and judgments can be substantial, hence careful attention must be paid to limits purchased.

Responding to the Class Action

Class Actions begin with a letter to the organization threatening a class action. Once such a letter is received, it must be tendered/noticed to all potentially applicable insurers as soon as possible. Whether the letter will be considered a claim or notice of a potential claim under a policy depends on the contents of the letter and the wording of the policy. Notably, delay in tender may imperil coverage. Additionally, even if a tender/notice is treated as merely a potential claim, when the tender/notice ripens into an undeniable claim, *i.e.* a lawsuit, it relates back to the time of the initial notice/tender under most policies, which is important as it leaves limits available for other claims under subsequent policies.

Faced with a CLRA action, the organization should be braced for a substantial reservation of rights and/or denial by its insurer(s). It is then incumbent upon the broker and coverage counsel to work with the organization to secure a defense and ultimately funding for settlements or judgments.

The defense of the claim has to be coordinated with the coverage efforts and carefully managed. The policies are usually claims made policies where defense costs erode the overall limits, or in some instances there is a separate limit for defense costs. It is important to keep in mind that a vigorous defense is usually an expensive defense, which will erode the limits necessary to settle the class action and/or fund a judgment. Even if there is a sublimit for defense costs, it is important to be mindful of the limit and the extent of its erosion because the defense of class actions tends to be very expensive. Because of these factors, it is imperative that class actions be evaluated early and decisions regarding settlement made early. Additionally, be mindful of the coverage throughout litigation. You do not want to eliminate potentially insured claims, while retaining claims which are clearly not covered. The organization and its counsel need to advocate for wording in settlement agreements, verdicts and judgments which preserve coverage.

[1] California Health & Safety Code §1430(b)

[2] California Superior Court, Humboldt County; No. DR060264

[3] California Health & Safety Code § 1430(b) is only applicable to licensed health care providers

[4] California Civil Code §1750, et. seq.

^[5] California Civil Code §§1770 & 1780

^[6] California Civil Code §1780(b)(1)

Linda E. Klamm, Esq. of Hanson Bridgett LLP

lklamm@hansonbridgett.com

(415) 995-5084

Samantha D. Wolff, Esq. of Hanson Bridgett LLP

swolff@hansonbridgett.com

(415) 995-5020

Robert N. Lane of Willis Towers Watson

robert.lane@WillisTowersWatson.com

(949) 930-1772

For more information, please contact:

Linda E. Klamm, Partner

415-995-5084

lklamm@hansonbridgett.com

Samantha D. Wolff, Partner

415-995-5020

swolff@hansonbridgett.com