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CLASS ACTION STAFFING CLAIMS AGAINST SENIOR LIVING COMMUNITIES: MATCHING CAPABILITIES WITH NEEDS

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CLASS ACTION STAFFING CLAIMS AGAINST SENIOR LIVING COMMUNITIES: MATCHING CAPABILITIES WITH NEEDS

INTRODUCTION

Numerous lawsuits have been brought against national senior living companies alleging that inadequate staffing has resulted in injury or other damage to residents. In an effort to maximize their damages recovery and prosecute their claims most efficiently, plaintiffs' lawyers have sought to fashion their litigation as class actions, permitting them to use representative residents as plaintiffs to carry the lawsuit forward on behalf of all similarly situated residents. The alternative is for each resident to bring an individual lawsuit, which is far more burdensome to plaintiffs and their attorneys.

Typically, Operators will seek to prevent the certification of a class by pointing out the differences between class representatives named in the litigation and other members of the broader resident class. For example, because senior living residents have widely differing care needs, it is difficult in a class action to generalize about whether overall staffing patterns are sufficient to provide services to any given resident. Some plaintiffs have used different legal theories to better support a class action claim, such as alleging that advertising and resident contracts misrepresent the suitability of staffing levels to provide adequate levels of care.

In 2023, courts have issued rulings in class action cases that raise concerns for senior living operators about how staffing levels and quality of care are measured and described to residents and prospective residents.

FEDERAL COURT DECISIONS DENY, AND THEN UPHOLD, CLASS CERTIFICATION IN STAFFING CASES

In March of 2023, a federal district court in *Stiner v. Brookdale Senior Living, Inc.* 2023 WL 2722294 (N.D. Cal. March 30, 2023), refused to grant class certification to plaintiffs in a wide-ranging lawsuit alleging systematic understaffing of assisted living facilities, along with maintaining unlawful barriers to disabled persons and misleading representations to resident prospects.

However, in August of 2023, the Ninth Circuit Court of Appeals upheld an earlier federal district court ruling that granted class certification in a similar case where it was alleged that staffing levels did not meet the assessed needs of residents, contrary to representations made in residents' contracts. *Heredia v. Sunrise Senior Living* 2021 WL 6104188 (C.D. Cal. Nov. 16, 2021) and 2023 WL 4930840 (9th Cir. August 2, 2023).

At issue in both cases was whether a claim that broad allegations of understaffing at numerous assisted living facilities operated nationally is susceptible to treatment as a class action, where class members must have sufficiently common interests and class representatives' interests are typical of the class as a whole.

1. Background: The Legal Requirements to Certify a Class

For a court to certify a class in any class action suit, the class must meet four threshold requirements. These requirements are (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy. (Fed. Code Civ. Proc. Rule 23(a).) First, numerosity requires that the class is so large in number that trying a case with individual plaintiffs would be impractical. Second, commonality requires that there are questions of law or fact common to the whole class. Third, typicality requires that the claims or defenses asserted by the representative class members are typical of the claims or defenses of the whole class. Fourth, adequacy requires that the representative class members will fairly and adequately protect the interests of the whole class.

If all four requirements are met, the class must satisfy by evidentiary proof one of the following three requirements: (1) if the party opposing the class has acted or failed to act in a way that applies generally to all classes so that relief through the suit appropriately applies to all class members, (2) trying the class action as separate suits would result in inconsistent rulings or would infringe on the interest of other class members, or (3) the common questions of law or fact predominate over any questions affecting only individual members. (Fed. Code Civ. Proc. Rule 23(b).)

If the above requirements are met, a court may grant class certification. Both district courts in *Stiner* and *Heredia* fully applied the above requirements to the proposed class and yet, came to different conclusions. In *Stiner*, the court ultimately denied class certification because the class failed to meet the commonality requirement and failed to show how common questions of law or fact predominate over questions affecting individual members (the “predominance requirement”). (*Stiner v. Brookdale Senior Living, Inc.* (N.D. Cal., Mar. 30, 2023, No. 17-CV-03962-HSG) 2023 WL 2722294, at *41.) In *Heredia*, the court granted class certification, finding that the class successfully met both the commonality and predominance requirements. The Ninth Circuit affirmed the class certification in *Heredia*. (*Heredia v. Sunrise Senior Living, LLC* (C.D. Cal., Nov. 16, 2021, No. 818CV01974JLSJDE) 2021 WL 6104188, at *11.)

2. The Court’s Reasoning for Denying Class Certification in *Stiner*

In *Stiner*, plaintiffs brought a wide-ranging lawsuit alleging systematic understaffing of assisted living facilities, along with maintaining unlawful barriers to disabled persons and misleading representations to resident prospects.

Plaintiffs sought to have the court certify three classes of residents: (1) mobility and vision impaired residents facing architectural and transportation barriers; (2) disabled residents needing assistance with activities of daily living (ADLs), and (3) residents who paid fees in reliance on misleading statements and omissions allegedly made by Brookdale. Residents requiring ADL care allegedly were denied adequate care due to a policy of “systematically” understaffing facilities.

The court, in a 75 page opinion, examined whether there were questions of law or fact common to each class sufficient to certify them to proceed with class action litigation.

Class certification was denied as to the architectural barrier and transportation claims on the basis that the physical differences at the different locations may make it impossible to identify a common body of evidence that each proposed class member could rely on to resolve their claim, and that each transportation claim involved a “highly individualized inquiry” that was not susceptible to class action treatment.

On the systematic understaffing claim, Plaintiffs sought a “reasonable modification” of the company’s staffing formulas, but the court found that reasonable modification claims are “not suitable for class certification,” noting that “courts have been wary of certifying claims based on a defendant’s failure to adequately staff its facilities because such claims tend to require granular and individualized inquiries about injury and causation.” Certification of the class was denied.

Class certification of the class that allegedly had been monetarily damaged by misrepresentation and omissions also was denied because “individualized issues regarding what was promised and what was delivered would predominate over common issues.”

3. The Reasons for Granting Class Certification in Heredia

Contrary to the ruling in *Stiner*, the federal district court in Heredia found that the plaintiffs’ class could be certified.

Sunrise opposed class certification, arguing that Plaintiffs’ claims failed to meet the “predominance” and “commonality” tests for class certification because staffing varied based on each resident’s needs, the local manager’s discretion, and the ‘neighborhood’ where the resident lived. However, the court found sufficient commonality of legal or factual issues, which predominated over the differences among individual class members, in the fact that all residents were required to sign a residency agreement, which discussed an assessment process, and that all residents were subject to the same allegedly deficient staffing model. Specifically, Plaintiffs alleged that Sunrise made uniform representations in its standardized contracts that it “will use its resident assessment system to identify the level of care necessary to ensure that residents receive the services they require.” Other areas of commonality included the use of a system of resident assessments and corresponding service levels, and a linkage between those service levels and different prices charged for the services. There was also evidence that Sunrise staff had little discretion to vary caregiver hours.

On the misrepresentation claims, the court found that common questions of whether residents are, for example, “likely to be deceived” by Sunrise’s statements as to its assessment process and care services were capable of being resolved on a class-wide basis. It reasoned that even if the circumstances of each particular class member may vary, a single common question is all that is required for commonality test. The Court noted that plaintiffs had provided evidence that they can prove their claims that “members of the public are likely to be deceived” through use of Sunrise’s own business records, marketing materials, and statements from its staff personnel.

The district court’s decision in *Heredia* was affirmed by the 9th Circuit Court of Appeals, and so the *Stiner* ruling against class certification is effectively overruled.

LESSONS LEARNED FROM HEREDIA AND OTHER CASES WITH ALLEGATIONS OF INSUFFICIENT STAFFING

Even before the *Heredia* and *Stiner* class action cases, many lawsuits have been brought against assisted living operators alleging personal injuries and other damages based on claims of understaffing.

In some of these cases, the concern has focused on whether and how overall staffing levels are related to the cumulative results of individual resident assessments. In other cases, the emphasis has been on what representations were made about staffing levels and the ability to provide appropriate care, and the truthfulness of those representations.

In some of those cases, the parties entered into stipulated court orders that outline certain best practices that were identified to settle pending litigation and which could reduce the risk of future claims. The key elements of those stipulated orders are summarized below.

In one stipulated court order, a national assisted living provider agreed to a specific system for determining staffing levels based on resident assessments. While applicable regulations did not require specific staffing numbers or ratios, the order required the operator to:

1. comply with applicable regulations by providing daily community resident care personnel, sufficient in numbers and competent, to provide the services necessary to meet the resident needs.
2. comply with applicable regulations by providing sufficient resident care staff necessary to provide the assistance and care to each resident in those activities of daily living which the resident is unable to do for himself/herself, as determined by their most recent resident assessment.
3. comply with applicable regulations by providing an adequate number of direct care staff to support each memory care resident's physical, social, emotional, safety and health care needs as identified in his/her current assessment.
4. determine the minimum resident care personnel necessary to meet each resident's daily care needs, using each resident's most recent assessment and calculated as follows:
 - a. Each resident shall have daily personal care minutes assigned to them as part of the resident assessment process. The daily personal care minutes assigned to each resident shall be determined by the number of minutes Operators, using their assessment software program, determine are necessary to perform each assessed care task ("Assessed Minutes").
 - b. The total care staff hours worked during a two week period shall at least equal the "Required Resident Care Personnel Minutes," defined as: (i) the daily aggregated Assessed Minutes of all residents of the Community during the preceding two week period ("Care Hours"), plus (ii) additional daily resident care personnel minutes equal to twenty (20) percent of the Care Hours. The purpose for requiring the additional 20% in Care Hours is to account for the time required for Community resident care personnel to perform tasks that are not directly associated with providing assessed care services to residents, including charting, communicating with supervisors, co-workers, residents and family members, and other non-care tasks.

Exceptions were included for refused care and causes beyond the control of the operator.

A second stipulated court order focused on alleged misrepresentations and required the operator to:

1. refrain from making any oral or written statements to current or prospective residents (and if applicable, family members or representatives of current or prospective residents) that state or imply that resident assessments are the only factor used to determine, set or monitor staffing levels at operator's communities.
2. assure that that all new Residency Agreements contain disclosures as follows:
 - a. The resident assessments described in this Residency Agreement, including those conducted at the time of admission and thereafter during a resident's stay, are considered by Operator in determining, setting and monitoring staffing levels at its communities. Operator considers the assessments and other factors to determine, set or monitor staffing levels at Operator communities.
 - b. Operator does not guarantee that any resident will receive a specific number of minutes or amount of care on any given day or time period. The care level assigned to a resident represents an estimate only of the approximate range of care minutes or amount of care that Operator anticipates its community personnel will provide to the resident.
3. ensure that its web pages, marketing brochures or other materials, any other written statements provided to or made available to the consuming public that discuss resident assessments contain the following disclosure substantially in this form: "In determining and monitoring staffing levels, Operator considers resident assessments and other factors."
4. ensure that all Residency Agreements, web pages, marketing brochures or other materials, and any other written statements to be provided to or made available to the consuming public and that discuss resident assessments are in compliance with the terms of this order.
5. all new Residence and Care Agreements contain disclosures as follows: (a) the resident assessments described in the Residence and Care Agreement, including those conducted at the time of admission and thereafter during a resident's stay, are considered by Operator in determining, setting and monitoring staffing levels at its communities. Operator considers the assessments and other factors to determine, set or monitor staffing levels at Operator communities; and (b) Operator does not guarantee that any resident will receive a specific number of minutes or amount of care on any given day or time period.

CONCLUSION

Litigation in the area of allegedly insufficient staffing leading to inadequate care has been pursued on at least two disparate theories: (1) that staffing levels were unrelated to the care needs of residents, and (2) that representations that sufficient staffing levels were in place to provide appropriate care were misleading. The first theory works well in individual injury claims but not so well as the basis for a class action, because of the wide divergence of levels of need among residents in a given community. On the other hand, claims that the appropriateness of staffing levels were misrepresented are more conducive to class actions. The settlements and class action decisions discussed above highlight the importance of both: (1) having a demonstrable correlation between resident assessment findings and staffing levels, but (2) not representing that staffing levels are sufficient to provide appropriate care or precisely match individual residents' needs. A balance between these two objectives will help reduce the risk of individual and class claims for damages as a result of inadequate staffing.

ABOUT THE AUTHORS

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