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**DEFENDING AGAINST
CONSUMER
PROTECTION ACT
CLAIMS IN LTC
NEGLIGENCE CASES**

Why Consumer Protection Act Claims?



TREBLE DAMAGES AND ATTORNEYS' FEES

Virginia § 59.1-204

Pennsylvania §201-9.2

Texas Business and Commerce Code § 17.50

Colorado Revised Statutes §6-1-113

New Hampshire Statutes Title XXXI, § 358A-10

Ohio Revised Code § 1345.09

Massachusetts Gen. Laws Part 1, Title XV, Ch. 93A § 9



RED FLAG



**DISCOVERY REQUESTS
FOR ADVERTISING &
MARKETING MATERIALS**

STATUTORY INTENT OF CPAs

- ❖ Remedial Legislation
- ❖ Promoting Fair and Ethical Standards of Dealings
- ❖ Between Suppliers and the Consuming Public



APPLICATION TO LTC CASES

Suppliers: Seller or Professional Who Advertises, Solicits or Engages in Consumer Transactions



Consumer Transaction: Advertisement, Sale or Offering for Sale of Goods or **Services**

DEFENDING CPA CLAIMS

- 1. CPA STATUTORY EXCLUSIONS/EXEMPTIONS**
- 2. LACK OF STANDING**
- 3. NATURE OF THE CLAIM**

STATUTORY EXCLUSIONS

Ohio §1345.12 – Excludes personal injury or death claims

Texas Bus. & Comm. Code §17.49 – Excludes actions for bodily injury or death

VA Code § 59.1-199: Excludes aspects of a consumer transaction authorized under VA or US laws, regulations or advisory opinions.

Colorado Cons. Prot. Act: §6-1-106: Excludes transactions in compliance with a regulation, statute or court order

Mass. Gen. Laws, Pt. 1, Title XV, Ch. 93A, §3 – Exempts transactions otherwise permitted under laws and administered by regulatory boards.

SANCTIONED OR CONDONED BY STATUTE

IS IT ENOUGH THAT A PARTICULAR SERVICE OR CONDUCT IS ADDRESSED IN A STATUTE?

DOES THE STATUTE OR REGULATION SANCTION OR CONDONE SUBSTANDARD CARE?

WHAT IF IT IS IN A STATUTE, BUT THE STATUTE IS NOT FOLLOWED?

PARTICULAR ASPECT

Manassas Autocars, Inc. v. Couch, 274 Va. 82 (2007)

The exclusion applies to aspects of a consumer transaction that are sanctioned or condoned by statute or regulation, not to entire industry. Conduct simply addressed in a statute or regulation does not constitute authorization.

Wingate v. Insight Health Corp., 87 Va. Cir. 227 (2013)

No law would authorize misrepresentations. To be condoned, the law would have to involve advertising and sale of the good or service.

BEATY v. MANOR CARE, INC.

2003 U.S. Dist. LEXIS 25044 (E.D.Va.)

- ❖ Advertising brochure with statements on staff training, 24-hour supervision, high staffing ratios that were not provided.
- ❖ VCPA Demurrer: VA Code § 63.1-174 only need adequate staff to provide services and State Board regulates adequate staffing claims.
- ❖ Ruling: The alleged transaction was inducement to enter the contract, not deficiency of care. The regulations do not cover misrepresentations made regarding degree of supervision. To qualify, the regulation would have to be about advertising and sales.

EXEMPT BY REGULATION

Evans v. Diamond Healthcare 73 Va. Cir. 502 (2007)

Nursing home sued for improper disclosure of confidential information is heavily regulated under 45 C.F.R. §§ 164.501, 506 and is exempt from the CPA claim.

Caruth v. Clark, 2017 U.S.D.C. LEXIS 57077 (E.D.Va.)

Dentist advertising services for which he lacks experience is exempt from CPA. Dental profession is regulated by Board of Dentistry that establishes qualifications, licenses and disciplines.

**BROGAN V. NATIONAL HEALTHCARE CORP.
103 F.SUPP. 2D 1322 (N.D.GA. 2000)**

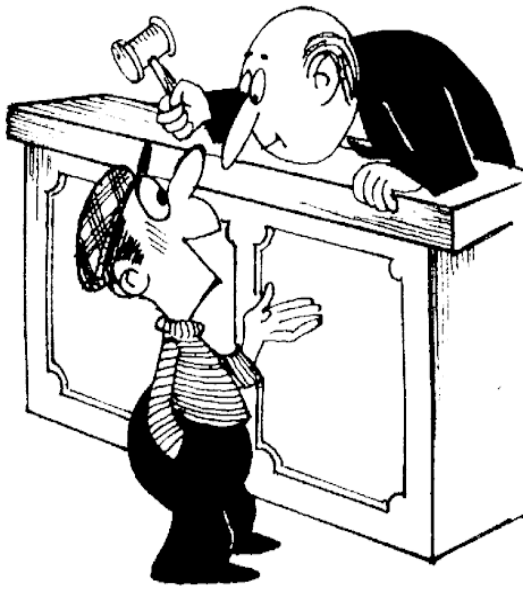
Plaintiff claimed deficient levels of care from poor CNA training, poor nutritional support, and failure to provide timely nursing care in a skilled care facility. These services are highly regulated by state and federal agencies. The Georgia Fair Business Practices Act does not apply to actions or transactions regulated by state or federal agencies and the claims were dismissed.

LACK OF STANDING DEFENSE

- ❖ CPA CLAIMS ARE STATUTORY CLAIMS
- ❖ NOT COMMON LAW CLAIMS
- ❖ FOR FRAUD IN CONSUMER TRANSACTIONS
- ❖ STATE PROBATE CODE APPOINTING ADMINISTRATOR = FOR PERSONAL INJURY OR WRONGFUL DEATH CLAIMS

APPOINTMENT OF ADMINISTRATOR

Appointment Under § 64.2-454



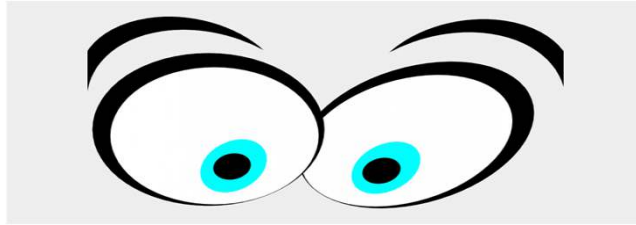
An administrator may be appointed in any case in which it is represented that either a civil action for personal injury or death by wrongful act or both,..., is contemplated,..., on behalf of the estate,..., and an executor or administrator has not been appointed under § 64.2-500-502.

CPA CLAIMS

PERSONAL INJURY? WRONGFUL DEATH?

- 1. How is the CPA constructed?**
- 2. How are CPA claims treated in the Code?**
- 3. What is the source of the duty?**

LOOK AT THE CPA



1. **Legislative intent:** to promote fair and ethical standards of dealings between suppliers and the consuming public.
2. **Prohibited Practices:** series of “fraudulent acts” by suppliers in connection with a consumer transaction that are declared unlawful by statute.
3. **Claims that CPA is a personal injury statute** are looking at the remedy sought and not the cause of action.

DAMAGES DESCRIPTION

Any person who accepts a cure offer under this chapter may not initiate or maintain any other or additional action based on any cause of action arising under any other statute or common law theory if such other action is substantially based on the same allegations of fact on which the action initiated under this chapter is based.

ACCRUAL & LIMITATION OF ACTIONS

§ 59.1-204.1 A: Any individual action pursuant to § 59.1-204 ..., shall be commenced within two years after such accrual. The cause of action shall accrue as provided in § 8.01-230.

§ 8.01-230: Accrues from date of injury for personal injury actions; Defaults to §8.01-249 for VCPA cases.

§ 8.01-249: Accrual in personal actions: In actions for fraud, mistake and VCPA violations, when the fraud, misrepresentation, etc. is discovered.

SOURCE OF THE OBLIGATION

Tingler v. Graystone Homes, Inc., 834 S.E.2d 244

- ❖ Homeowner sued builder re: water leaking around doors causing mold
- ❖ Breach of contract; negligent construction and repair; negligence *per se*
- ❖ Duty: use of proper workmanship, due care in inspection and work supervision
- ❖ Issue: Contract or Negligence?



SOURCE OF DUTY

- ❖ In determining whether a cause of action sounds in tort or contract or both, the source of the duty violated must be ascertained.
- ❖ The mere fact that a plaintiff seeks recovery for pain and suffering does not convert a contract claim into a tort claim.
- ❖ To recover in tort, a common law duty must have been breached, not a duty created by contract.
- ❖ What about when the VCPA is the source of the duty? It is a statutory duty. *Abi-Najm v. Concord Condominium, LLC*, 280 Va. 350 (2010).

FRAUD DEFENSES - BOP

❖ THREE ELEMENTS:

False Representation Of A Material Fact

Reliance

Resulting Damage Or Injury



❖ TREBLE DAMAGES – Knowingly & With Intent To Deceive

❖ PREPONDERANCE OF THE EVIDENCE – *Ballagh v. Fauber Ent., Inc.*, 29 Va. 120 (2015)

COMMON CPA ALLEGATIONS

Prohibited Practices

- ❖ **Misrepresenting that services have certain characteristics, such as a certain level of care.**
- ❖ **Misrepresenting that goods or services are of a particular standard or quality, such as repositioning every 2 hours.**
- ❖ **Using any other deception, fraud, false pretense, false promise, or misrepresentation in connection with a consumer transaction.**

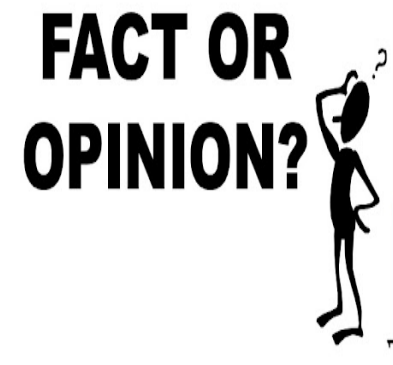
MATERIAL FACT

❖ FACT AND NOT OPINION

- Diagnoses, Assessments, Evaluations Are Opinions

❖ EXISTING AND NOT FUTURE FACT

- Prognosis Is Not Existing Fact
- Projecting when a wound will heal



MISREPRESENTATION

*Adams v. Children's Hospital of the King's
Daughters* 100 Va. Cir. 68 (Norfolk 2018)

- ❖ The Misrepresentation Must Be In Connection With A Consumer Transaction
- ❖ Consumer Transaction: Sale, Advertisement Of Medical Goods Or Services = Cannot Be Related to Whether Goods or Services Were Provided Within the Required Level or Standard of Care

ADVERTISING FOR SERVICES YOU DO NOT PROVIDE

Beaty v. Manor Care, Inc., 2003 WL 24902409 (E.D.Va. 2003)

Advertising brochure with statements on staff training, 24-hour supervision, high staffing ratios that were not provided.

The transaction was the inducement to enter the contract.

This is about misrepresentations, not about deficiency of care.

QUALITY vs ABSENCE



STANDARD OF CARE

VS.

PROMOTING CARE
NOT PROVIDED

SUMMARY

- 1. EXCLUSIONS:** Compare the aspect of the transaction to the law or regulation
- 2. LACK OF STANDING OF ADMINISTRATOR**
- 3. CPA CLAIMS ARE FRAUD CAUSES OF ACTION:** Use standard fraud defenses



QUESTIONS ??