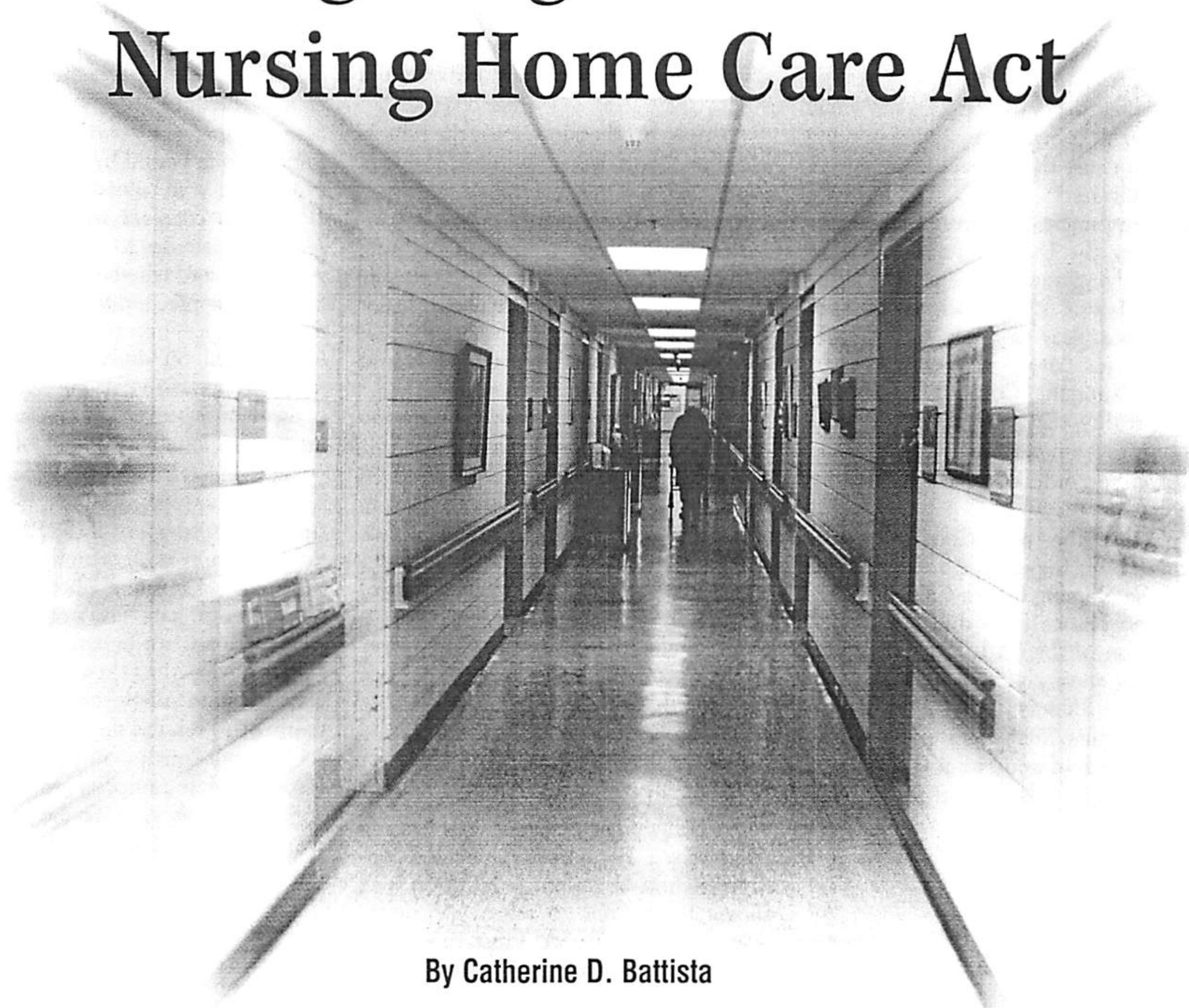
Navigating the Illinois Nursing Home Care Act



By Catherine D. Battista

Amid growing concerns about the treatment of nursing home residents,[1] the Illinois General Assembly adopted the Illinois Nursing Home Care Act ("NHCA").[2] The NHCA not only addresses the public concerns about the quality of nursing home care, but also creates a new cause of action.

The NHCA empowers nursing home residents to act as their own "private attorney generals."[3] Under the NHCA, nursing home residents may file a private cause of action against nursing home owners and licensees when a resident has been abused or neglected or when any of the "rights" afforded to residents under the NHCA have been violated. The theory underlying the NHCA is that since the Illinois Department of Public Health ("IDPH") cannot possibly detect every incident of nursing home abuse, residents can identify and seek recovery themselves for any violations of the NHCA at the trial court level.[4]

Unlike traditional healing arts malpractice claims, the NHCA specifically spells out who may be liable for injuries to a nursing home resident, i.e., only the owner and licensee of the facility. The NHCA is also specific in who has standing to bring a claim for violations of the act – only the resident or his

1. *Harris v Manor Healthcare Corp,* 111 Ill 2d 350, 357-58, 489 NE2d 1374, 1376-77 (1986), quoting Senate Debates, 81st Ill Gen Assem, May 14, 1979, at 184 (statements of Senator Karl Berning).
2. 210 ILCS 45/1-101 et seq.
3. *Eads v Heritage Enterprises, Inc,* 204 Ill 2d 92, 98, 787 NE2d 771, 774 (2003).
4. Id at 97-8, 787 NE2d at 774.

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This article is a common-sense guide for practitioners filing claims under the Illinois Nursing Home Care Act ("NHCA"). It also discusses how claims brought for violations of the NHCA are often easier to bring than traditional medical malpractice or healing arts claims.

appointed representative.

However, many of the restrictive bells and whistles that go along with a common law healing arts claim are absent in a complaint filed under the NHCA, such as the requirement of a section 2-622 affidavit. The damages available under NHCA are also broader than in healing arts claims and may become even more extensive depending on the Illinois Supreme Court's review of *Vincent v Alden-Park Strathmoor, Inc*,[5] which discusses whether punitive damages should be permitted under the NHCA.

Note, however, that the Illinois Supreme Court ruled recently that the Federal Arbitration Act trumps state law, meaning that many nursing home residents can be forced into arbitration rather than being allowed to take their case to trial. For more, see Eugene Basanta and Suzanne Schmitz's article in this issue.

Identifying the owner and licensee

Unlike other healing arts malpractice claims, which may be brought against individual caregivers such as doctors, nurses, and the like, claims for violations of the NHCA may only be brought against the owner or licensee of the nursing home. Under the NHCA, the owner and licensee of the nursing home are liable to a resident for any intentional or negligent act or omission of their agents or employees which injures the resident.[6]

The NHCA defines "owner" as the individual or entity that owns the facility.[7] However, if a facility is operated by a person who leases the facility from the actual owner, "owner" can mean the lessor, not the true owner.[8] An exception applies where the owner of the facility is an affiliate of the lessor and the owner has significant control of day-to-day operations at the nursing home.[9] In such a case, the lessor and the owner shall be jointly and severally liable for all violations of the NHCA.[10]

Under the NHCA, "licensee" simply means the individual or entity licensed by IDPH to operate the facility.[11] For purposes of naming the correct defendants in a complaint for NHCA violations, the owner and licensee can be identified using the IDPH and Illinois Secretary of State websites.

Nursing homes are like onions – with many different layers to afford protection from litigation and to limit liability. One of the first things a practitioner should do when presented with a potential nursing home case is to visit the websites of the IDPH[12] and the Illinois Secretary of State[13] to identify the corporate entities and individuals who may be named as defendants.

The IDPH's "Nursing Homes in Illinois" website is an invaluable resource to practitioners investigating a potential claim against a nursing home. The site offers a complete list of the nursing homes in Illinois. With each nursing home listing comes information about the facility, its owners and licensees, the administration, and all complaints made against the facility – as well as the results of subsequent investigations by IDPH.

Once a practitioner identifies any entities that own, control, manage or are licensed to run a nursing home, they can be cross-checked through the Illinois Secretary of State website to determine the location of the registered agent for purposes of service.

NHCA claims may be brought for abuse, neglect, or when resident "rights" are violated

Violations of the NHCA occur, and a claim against the owner and licensee may be brought, when a facility "abuses" or "neglects" its residents. "Abuse" means any physical or mental injury or sexual assault inflicted on a resident other than by accidental means in a facility.[14] "Neglect" means a facility's failure to provide, or willful withholding of, adequate medical care, mental health treatment, psychiatric rehabilitation, personal care, or assistance with activities of daily living that is necessary to avoid physical harm, mental anguish, or mental illness of a resident.[15]

Unlike traditional medical malpractice or "healing arts" claims, a section 2-622 affidavit is not required for claims brought pursuant to the NHCA.

Common forms of nursing home "abuse" and "neglect" include dropping residents or allowing them to fall, failure to treat or prevent bed sores, lackluster approaches to personal hygiene (e.g., the changing of incontinence undergarments and bathing), failure to nourish and hydrate a resident, or even physical and sexual abuse to a resident by nursing home employees or other residents.

While many claims brought under the NHCA are for "abuse" or "neglect,"

5. *Vincent*, 399 Ill App 3d 1102, 928 NE2d 115 (2d D 2010).
6. 210 ILCS 45/3-601.
7. 210 ILCS 45/1-119.
8. Id.
9. Id.
10. Id.
11. 210 ILCS 45/1-115.
12. http://www.idph.state.il.us/healthca/nursinghometestjava.htm.
13. http://www.cyberdriveillinois.com.
14. 210 ILCS 45/1-103.
15. 210 ILCS 45/1-117.

a resident may also bring a claim when any of the following "rights" are violated: the right to manage financial affairs;[16] the right to personal property;[17] the right to retain a personal physician;[18] the right to respect and privacy in medical and personal care;[19] the right to be free from physical restraints;[20] the right to be free from unnecessary drugs;[21] the right to unimpeded private and uncensored communication;[22] the right to free exercise of religion;[23] the right to be discharged after giving written notice;[24] the right to present grievances;[25] the right to refuse to perform labor for the facility;[26] and the right to be free from unlawful discrimination.[27]

If the supreme court finds that punitive damages are permitted under the NHCA, the incentive to file claims for nursing home abuse or neglect or for the violation of resident rights will increase.

The bottom line: the causes of action available to a nursing home resident are broad and not limited to faulty medical care and related treatment.

Only a nursing home resident has standing to bring a claim

Claims for NHCA violations may be brought by the resident or his estate under the Illinois Survival Act ("Survival Act").[28] However, family members of the resident have no standing to bring a claim against a nursing home for violations of the NHCA under a "wrongful death" or similar claim.

A resident who is living may always bring a claim against a nursing home for abuse, neglect, or other violations of the NHCA. If a resident is mentally disabled, incompetent, or otherwise unable to make decisions for himself, the resident's legal guardian may also bring a claim on behalf of the resident for NHCA violations. If a resident is deceased, his estate may bring a cause of action for statutory violations of the NHCA pursuant to the Survival Act.

The Survival Act provides that "[i]n addition to the actions which survive by the common law, the following also survive: actions to recover damages for an injury to the person."[29] The Survival Act does not create a statutory cause of action but instead allows the decedent's estate to maintain those statutory or common law actions that had already accrued prior to the decedent's death, such as a claim for violations of the NHCA.[30]

In *Meyers v Heritage Enterprises, Inc*, the fourth district recognized that while the NHCA may not specifically provide for the survival of a resident's cause of action upon his death, "'[i]t is well established that the Illinois survival statute allows a decedent's representative to maintain those common law or statutory actions which had already accrued to the decedent prior to his death.'"[31] Accordingly, a resident's appointed representative may bring the deceased's cause of action under the NHCA for injuries incurred prior to his death pursuant to the Survival Act.[32]

While claims for violations of the NHCA may be brought under the Survival Act, however, wrongful death claims are not permitted.

In *Pietrzyk v Oak Lawn Pavilion, Inc*, the first district held that while the Survival Act provides recovery for injuries actionable under the NHCA that were sustained by the decedent prior to his death, the wrongful death claims only provide recovery of damages to the decedent's next of kin for *their* loss, and not for any loss suffered by the deceased resident under the NHCA.[33]

Heirs who will benefit from a wrongful death award have no standing under the NHCA. They do not fall within the class of individuals intended to be protected under the NHCA, which seeks to compensate the "resident," and not the "heirs of a resident."[34]

Notably, nothing prevents the heirs of a decedent from bringing a wrongful death claim against a nursing home for negligent conduct that caused the death of their loved one. Such claims simply cannot be brought pursuant to the NHCA. But wrongful death claims for nursing home negligence will fall within the scheme of traditional healing arts malpractice cases. Accordingly, certain benefits from filing a claim under the NHCA will not apply – such as the freedom to file a complaint without having to affix a section 2-622 affidavit.

Claims filed under the NHCA are exempt from section 2-622

In actions based upon medical, hospital, or other healing art malpractice, section 2-622 of the Illinois Code of Civil Procedure requires the plaintiff to attach an affidavit to his complaint declaring that he has consulted with a healthcare professional who has determined in a written report that "there is a reasonable and meritorious cause for filing such action."[35] Failure to comply with section 2-622 can be grounds for dismissal of the complaint under section 2-619 of the Code.[36]

Unlike traditional medical malpractice or "healing arts" claims, a section 2-622 affidavit is not required for claims brought pursuant to the NHCA.

In *Eads v Heritage Enterprises, Inc*, the Illinois Supreme Court adopted the findings of the fourth district "that the mandates of section 2-622 are not binding on plaintiffs who seek recovery under the [NHCA]."[37] The court found that section 2-622 postdated the NHCA and had different objectives. Specifically, the NHCA was directed at nursing home reform, while section 2-622 was enacted in response to what was perceived by the Illinois General Assembly to be a crisis in the area of medical malpractice litiga-

16. 210 ILCS 45/2-102.
17. 210 ILCS 45/2-103.
18. 210 ILCS 45/2-104.
19. 210 ILCS 45/2-105.
20. 210 ILCS 45/2-106.
21. 210 ILCS 45/2-106.1.
22. 210 ILCS 45/2-108.
23. 210 ILCS 45/2-109.
24. 210 ILCS 45/2-111.
25. 210 ILCS 45/2-112.
26. 210 ILCS 45/2-113.
27. 210 ILCS 45/2-114.
28. 755 ILCS 5/27-6.
29. Id.
30. *Myers v Heritage Enterprises, Inc*, 332 Ill App 3d 514, 516-17, 773 NE2d 767, 768-69 (4th D 2002).
31. Id at 517, 773 NE2d at 769, quoting *Wasleff v Dever*, 194 Ill App 3d 147, 152, 555 NE2d 1132, 1135 (1st D 1990).
32. *Myers* at 516-17, 773 NE2d at 769-70.
33. *Pietrzyk*, 329 Ill App 3d 1043, 1049-50, 769 NE2d at 139-40 (1st D 2002).
34. Id at 1050, 769 NE2d at 140.
35. 735 ILCS 5/2-622(a)(1).
36. 735 ILCS 5/2-622(g).
37. *Eads* at 102-3, 787 NE2d at 777 affirming *Eads v Heritage Enterprises, Inc*, 325 Ill App 3d 129, 136-38, 757 NE2d 107, 112-14 (4th D 2001).

tion.[38] The NHCA sought to encourage claims, in other words, where section 2-622 sought to discourage them.[39]

For practitioners and their clients, the exemption from 2-622 results in tremendous savings. In contingency agreements, practitioners do not have to front the cost for an expensive expert to review the medical record and complaint to determine a meritorious action and the client subsequently will not have to reimburse his attorney for the cost of the expert from the proceeds of a settlement or judgment, maximizing the recovery to the client.

The exemption from section 2-622 also permits for faster filing of the complaint and, often, a quicker recovery for the client. There is no need to wait weeks, or sometimes even months, while a medical expert reviews materials related to the case. In many claims brought pursuant to the NHCA, the client, because of age or infirmity, may not have the time to wait for a section 2-622 expert to review his case.

The absence of a section 2-622 requirement under the NHCA is really a win-win for the practitioner and the client.

Damages under the NHCA are broader than in traditional healing arts claims

In a common law healing arts claim, a plaintiff may recover for all damages that were directly and proximately caused by the defendant, i.e. medical expenses, lost wages, pain and suffering.[40]The damages afforded to a successful plaintiff under the NHCA include not only those actual damages that were directly and proximately caused by the nursing home, but also include other damages not afforded to the traditional healing arts malpractice plaintiff.

For example, a plaintiff who brings a successful claim under the NHCA is also entitled to recover for his attorney fees from the licensee of the facility, with no statutory imposed minimum.[41] The "American Rule" does not apply. Further, any monies recovered by a plaintiff may not be taken into consideration when considering eligibility for medical aid under the Illinois Public Aid Code.[42]

Whether a plaintiff may recover for punitive damages under the NHCA is currently pending on appeal before the Illinois Supreme Court.

In *Vincent*, a deceased nursing home resident's representative filed a claim against a nursing home and asserted that the nursing home's willful and wanton conduct violated the NHCA, rendering the nursing home liable for actual damages, costs, attorney fees and punitive damages. The trial court certified the question of whether punitive damages were permitted under the NHCA and an interlocutory appeal was brought before the second district. The second district held that common law punitive damages are not available for willful and wanton violations of the NHCA.[43]

If the Illinois Supreme Court finds that punitive damages are permitted under the NHCA, the incentive to file claims for nursing home abuse or neglect or for the violation of resident rights will increase. It will mean enhanced recovery for some residents who suffer injuries at the hands of a nursing home. Permitting punitive damages under the NHCA may also act as a deterrent to nursing home facilities in Illinois that otherwise might be inclined to engage in negligent or abusive conduct.

Regardless of the outcome of *Vincent*, there are still a tremendous amount of positive reasons, as discussed above, for a practitioner to explore a claim for violations of the NHCA on behalf of a client.

Conclusion

Claimants who use the NHCA can avoid many of the burdensome restrictions that come with a medical malpractice or healing arts claim. The permitted damages and recovery are broader for the client. Claimants and their lawyers will, however, have to confront the prospect of enforced arbitration discussed by professors Basanta and Schmitz in this issue of the IBJ.

For a lawyer, there is also the satisfaction that comes with representing a client who, because of age or infirmity, truly needs competent legal representation to address abuse, neglect, or deprivation of rights suffered at the hands of his or her purported caregiver. Pursuing a claim under the NHCA can thus be very rewarding – both to the practitioner and to the client. ■

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38. *Eads* at 103, 787 NE2d at 777.
39. Id.
40. *Siwa v Koch*, 388 Ill App 3d 444, 447, 902 NE2d 1173, 1175 (1st D 2009).
41. 210 ILCS 45/3-602.
42. 210 ILCS 45/3-605.
43. *Vincent* at 1103, 928 NE2d at 117.