

# Elder abuse suits' swelling wave

*Cases over assisted-living facilities are keeping litigators busy*

**By Petra Pasternak**  
RECORDER STAFF WRITER

Since the mid-1990s, John Supple has kept busy defending skilled nursing homes. But now he's on to what lawyers say is the next frontier in elder abuse litigation: assisted living facilities.

"Assisted living companies are more vulnerable today because they are not licensed health care providers," says the San Francisco partner, who heads the health care practice group for Gordon & Rees. That means that, in contrast to medical malpractice suits, certain elder abuse cases carry no caps on general damages. "Many [centers] are quite successful financially so they appear to plaintiffs attorneys as good targets."

High stakes can mean higher rates for the defense lawyers, too, although the insurance industry has historically kept them in check.

As the population in California and across the country ages, assisted living centers — non-medical facilities that are seen as a less institutional alternative to nursing homes so often associated with linoleum floors and green walls — have grown in popularity.

But, as with nursing homes, accidents or health problems at assisted living centers can turn into liabilities. The death of an elderly resident who'd suffered from bed sores, for example, might result in a lawsuit alleging negligence or neglect and seeking punitive and general damages.

To handle the uptick, Gordon & Rees recently added two lawyers to its team of eight health care attorneys in San Francisco who focus on elder abuse law; the firm employs about 20

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SHELLEY EADES

**BUILDING UP:** Gordon & Rees partner John Supple heads his firm's health care practice group, which has recently added more lawyers focused on elder abuse law.

# ELDER

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full-time elder law attorneys nationwide. Supple is also interviewing to hire a registered nurse with a paralegal certificate; it would be the third legal nurse consultant in the office.

Supple said that as much as 45 percent of his practice these days is made up of cases involving assisted living facilities, up from zero about five years ago. As the country's ranks of baby boomers swell, he expects that number to grow.

"It's a bomb waiting to go off," agrees Kathryn Stebner, who has practiced elder abuse law on the plaintiffs' side since 1987. She says her case load against assisted living facilities has doubled in the last five years. "There's more and more elders and there's nowhere to put them." In January, Stebner said, she settled two class actions against the Oregon-based Sunwest Management Inc. chain, one for \$5 million in California and one for \$1 million in Oregon.

"I call it the tort du jour," she said.

## BIGGER REMEDIES

Elder abuse cases weren't always so attractive to plaintiff attorneys. Lawyers say that the litigation only came into its own after California's Elder Abuse and Dependent Adult Civil Protection Act was amended in the early 1990s to provide certain enhanced remedies. For one thing, it introduced the possibility of attorneys fees awarded on top of a verdict in the most egregious cases, instead of relying on the kind of percentage-based contingency fee that's common in personal injury cases.

"One of the reasons the defendants settle these cases for higher amounts is because the attorneys' fees exposure is so great," Stebner said. A \$100,000 verdict in a typical personal injury case, for example, would cover both the plaintiff's share and the attorneys fees. The defendant could be exposed to more risk in an elder abuse case, Stebner said, because fees could be another \$400,000 on top of the verdict.

Also, unlike other personal injury cases in California, where the right to recover damages for pain and suffering dies with the plaintiff, in certain elder abuse cases, the heirs can still win damages.

There's a caveat for plaintiffs' attorneys though: Collecting might be difficult.

"The biggest challenge for the plaintiffs' bar is there is no insurance," Stebner said. The most dangerous facility, she added, is less likely to be insured.

## DEFENSE RATES

Though there are aspects of elder abuse legal work that can support higher rates,

the historical involvement of insurance carriers has cast a long shadow.

Supple, who started out as a medical malpractice attorney, said that the traditionally low rates paid by insurance companies continue to serve as a guideline even though they are less involved in elder abuse cases than in the past. Now it is competition from other firms that keeps rates under pressure.

"IP fees are just not going to happen," Supple said.

Gordon & Rees has increased rates in an incremental fashion to correspond to the amount of risk and staffing required, he said. Partners in its elder abuse practice charge between \$225 and \$250 per hour.

"If insurance companies are keeping my rates at the mid-\$200 level," Supple added, he feels he can't take a private company [client] on that doesn't have insurance [and] charge them higher than one that does have insurance."

The key to profitability, Supple said, is using the right mix of paralegals, legal nurse consultants and younger attorneys — and keeping them all busy.

Lewis Brisbois Bisgaard & Smith elder law group chair George Nowotny, who is based in Los Angeles, says defense-side rates can be boosted higher than in straight medical malpractice cases because elder abuse litigation can introduce corporate malfeasance, in which the plaintiffs argue the institution put profits over people.

The lion's share of accusations in these cases revolve, for example, around the allegation that a facility held on to a paying patient in declining health rather than sending them to a more appropriate facility. "It is the most value-driving component," Nowotny said. "It makes a case that's defensible on the clinical side indefensible."

Nowotny, who still does some medical malpractice work, said partner rates in his firm's elder practice range from \$175 to \$250, and estimates that traditional medical malpractice lawyers still charge about \$140 to \$175. His firm now employs 41 elder abuse lawyers nationwide, according to its Web site. Nowotny says it had added nine in February in Tampa, Fla. — what he calls the "epicenter" of elder abuse litigation.

Supple likes to compare elder abuse law to products liability 35 years ago. "We're still sorting out the rates and the law," he said. "We feel that ultimately the rates will reflect the skill level and the effort that the defense of these cases requires."

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