EXHIBIT 5

Public Health Law § 2801-d and the Nursing Home Crisis: The Propriety of Invoking the Statute in Routine Negligence Cases

By Andrew L. Zwerling

The nursing home industry is plagued by a crisis of immense proportions due, in part, to the increasing practice of plaintiffs, in routine negligence cases, asserting claims based on "residents' rights" statutes, such as New York's Public Health Law (PHL) § 2801-d. Public Health Law § 2801-d was designed to provide nursing home residents with a means by which to enforce their statutory and regulatory rights as residents, by endowing them with a private right of action for damages and other relief stemming from a deprivation of those rights. Unfortunately, however, this salutary statute, and others like it, have been transformed into a vehicle that has helped spawn one of the fastest-growing areas of health care litigation, i.e., lawsuits against nursing homes.

"It is this author's view that PHL-§ 2801-d was not designed to create a remedy for nursing home residents where there is a viable alternative cause of action, such as a negligence claim, to address the facts giving rise to the claimed injury."

The ability of plaintiffs in routine negligence cases to use a statutory claim as the basis upon which to parade evidence of alleged regulatory violations before the jury has led to larger jury awards. Fear that juries will confuse evidence of regulatory violations as conclusive proof of negligence has compelled nursing homes to settle otherwise defensible cases or to agree to higher settlements. This has contributed to spiraling insurance and litigation costs that have threatened the viability of nursing homes nationwide.

This article will address the propriety of plaintiffs asserting a statutory claim simultaneously with a negligence claim, where both causes of action are predicated upon the same facts. It is this author's view that PHL § 2801-d was not designed to create a remedy for nursing home residents where there is a viable alternative cause of action, such as a negligence claim, to address the facts giving rise to the claimed injury. Under such circumstances, negligence and statutory claims may not be pursued together. The statute was designed to supplement existing remedies by providing residents a private right of action where 1) no effective right existed previously and 2) where the alleged injury is *de minimis* and the private bar needs the financial incentives offered by the statute to protect the needs of the resident. In the latter circumstance, a plaintiff must make an election of remedies between pursuing the statutory claim and the traditional tort remedy.

The Statute

In relevant part, § 2801-d(1) of the Public Health Law provides:[1]

> Any residential health care facility that deprives any patient of said facility of any right or benefit, as hereinafter defined, shall be liable to said patient for injuries suffered as a result of said deprivation, except as hereinafter provided. For purposes of this section a "right or benefit" of a patient of a residential health care facility shall mean any right or benefit created or established for the well-being of the patient by the terms of any contract, by any state statute, code, rule or regulation or by any applicable federal statute, code, rule or regulation, where noncompliance by said facility with such statute, code, rule or regulation has not been expressly authorized by the appropriate governmental authority. No person who pleads and proves, as an affirmative defense, that the facility exercised all care reasonably necessary to prevent and limit the deprivation and injury for which liability is asserted shall be liable under this section.

The statute was part of a larger set of nursing home reforms implemented by the Legislature following revelations of horrifying nursing home abuses in the 1970s.[2]

Public Health Law § 2801-d was designed to assist residents by providing them with a private cause of action to enforce their statutory rights as residents, as delineated in PHL § 2803-c. Where a resident has "been deprived a right or benefit" and has been injured as a result of that deprivation, PHL § 2801-d provides for: 1) compensatory damages "in an amount sufficient to compensate said patient for such injury," with "minimum damages" fixed at 25% of the "daily per-patient rate of payment" established for the facility;[3] 2) an award of attorneys' fees;[4] and 3) punitive damages where the deprivation "is found to have been willful or in reckless disregard of the lawful rights of the resident."[5] The statute also authorizes class action lawsuits.[6]

Relevant Case Law: A Need for Clarity

Lower court cases in the Appellate Division, Second Department, have expressly held that where a resident has an available malpractice or negligence cause of action against a nursing home, he or she cannot sue under PHL § 2801-d based upon the same facts.[7] These decisions hold that PHL § 2801-d "was not intended by the legislature to provide a remedy for mere negligence on the part of a residential health care facility, at least where the injured patient has a viable cause of action under principles of tort liability."[8]

In *Begandy v. Richardson*,[9] a patient slipped and fell down stairs at a nursing home and, after filing suit, attempted to amend the complaint to add a claim under Public Health § 2801-d. Relying on the statute's legislative history, the court denied the plaintiff's application, holding that the resident had no cause of action under the statute, because the statute does not apply where a resident has a pre-existing right to bring a negligence action against the nursing home. The court also noted that additional statutory provisions, such as the inclusion of minimum damages and the right to bring class actions, were "not indicative of a typical personal injury action," and thus, further supported the conclusion that the statute was not intended to be used in a negligence action.[10] The court also opined that the Legislature could not have intended for plaintiffs alleging negligence to use PHL § 2801-d to "alter the traditional burden of proof . . . in a negligence action" by requiring defendant-nursing homes to plead and prove that it exercised reasonable care to avoid liability.[11]

In *Bielewicz v. Maplewood Nursing Home, Inc.*,[12] the court held that PHL § 2801-d did not create a private right of action for a nursing home resident who, left unattended, fell from his wheelchair. As the court stated, the statute is "not meant to authorize a private cause of action in every negligence case."[13] Similarly, in *Irma Acevedo v. Augustana Lutheran Home*,[14] the court denied plaintiffs' motion to amend the complaint to add a statutory claim under PHL § 2801-d, stating that it was "not prepared to find that a separate cause of action exists under Public Health Law § 2801-d."

In *Goldberg v. Plaza Nursing Home*,[15] the Appellate Division, Fourth Department, adopted the reasoning of the court in *Begandy v. Richardson, supra*, in rejecting an attempt by the administratrix of an estate to sue under the Public Health Law, where that cause of action was based upon the same facts as claims for wrongful death and intentional and negligent infliction of emotional distress. As the Fourth Department stated:[16]

> The record establishes that plaintiff's fourth cause of action is predicated on defendant's negligence. The various memoranda that accompanied the enactment of Public Health Law § 2801-d show that the purpose of that section was to provide a remedy to patients in residential health care facilities who are denied the rights and benefits enumerated in Public Health Law § 2801-c(3); the purpose of the statute was not to create a new personal injury cause of action based on negligence when that remedy already existed (*see*, 1976 McKinney's Session Laws of N.Y., at 1685–1686, 1764).
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> . . .
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> [W]e conclude that it is unlikely that the Legislature envisioned extension of the principle of strict liability to residential health care facilities for injuries and damages that are traditionally the subject of tort liability.

There are Appellate Division cases seemingly to the contrary, but, upon close scrutiny, those decisions do not clearly stand for the proposition that statutory claims may be pursued together with negligence claims even when based upon the same facts.[17]

In *Doe v. Westfall Health Care Center*,[18] the mother of an incapacitated nursing home resident brought an action against a skilled nursing home alleging negligence and a Public Health Law violation based upon the rape of her daughter by a nursing home's male health care aide. In sustaining the claim under § 2801-d,

the Appellate Division, Fourth Department, expressly declined to apply its reasoning in *Goldberg v. Plaza Nursing Home, supra*. The Fourth Department stated that, "[i]n our case, the complained-of conduct here—the rape of plaintiff's decedent—is precisely the sort of conduct that the Public Health Law section at issue was designed to target," because "recovery for such conduct is often barred for plaintiffs who sue at common law . . . Suits against hospitals or nursing homes to recover damages arising from sexual assaults upon patients usually founder because of the absence of the requisite element of foreseeability, i.e., the facility's lack of prior knowledge of the perpetrator's criminal tendencies."[19] "On this set of facts," and because of the "inadequacy of the common law causes of action" to redress this type of abuse, the Fourth Department sustained the plaintiff's § 2801-d claim. The Fourth Department overruled *Goldberg v. Plaza Nursing Home, supra*, only to the extent it mandated summary judgment of the Public Health Law claim where the viability of a co-existing common law cause of action was in doubt and a plaintiff would have no remaining right of action.[20]

But, as noted in the Second Department case of *Bielewicz v. Maplewood Nursing Home, supra*, the holding in *Doe v. Westfall Health Care Center, supra*, is limited to those instances where there is a "difficulty of recovery under common law." The *Doe* "exception was not meant to authorize a private cause of action in every negligence case."[21] Moreover, in *Doe v. Westfall Health Care Center, supra*, the plaintiff's negligence claim was one for negligent hiring and was *not* based upon the same facts as the PHL § 2801-d claim. Rather, the statutory claim was based upon a resident's right to be free from mental and physical abuse under PHL § 2803-c[3][h]. Thus, the court in *Doe v. Westfall Health Care Center, supra*, did not address a scenario in which the statutory and common-law claims depended upon the same facts.

In *Zeides v. Hebrew Home For the Aged*,[22] the Appellate Division, First Department, declined to dismiss the plaintiff's PHL § 2801-d claim in a negligence action. The First Department noted, however, that the sole issue before it was the timeliness of the plaintiff's medical malpractice claim.[23] Although the First Department stated that plaintiffs therein stated a cognizable action under the statute, it is notable that the defendant nursing home did not even acknowledge, address or attack the viability of the statutory cause of action.[24] Significantly, in his dissenting opinion, Justice Friedman, referencing *Goldberg* and *Begandy, supra*, acknowledged that "the purpose of section 2801-d was 'not to create a new personal injury cause of action based on negligence when that remedy already existed,'" and took issue with the majority's finding of a statutory claim where the issue was not even addressed by the parties.

Finally, in *Fleming v. Barnwell Nursing Home and Health Facilities*,[25] the Third Department upheld a plaintiff's right to amend a medical malpractice complaint by adding a claim under PHL § 2801-d. However, the issue of whether a plaintiff can simultaneously seek recovery for negligence and under § 2801-d, based on the same harm, was neither raised before or addressed by the court.

The Legislative History Favors the View that Plaintiffs Should Not Be Permitted to File Public Health Law Claims Based Upon the Same Facts As a Negligence Claim

It is firmly settled that "[t]he primary consideration of the courts in the construction of statutes is to ascertain and give effect to the intention of the Legislature."[26] Legislative intent drives judicial interpretations in matters of statutory construction.[27] Evidence of the legislative intent behind the enactment of PHL § 2801-d supports the position that the statute does not authorize simultaneous assertion of a statutory claim and a negligence claim based on the same facts.

Memoranda underlying the enactment of PHL § 2801-d show "that the purpose of 2801-d was to create a private right of action where no such right previously existed."[28] "Obviously, the right of a nursing home resident to bring a personal injury action predicated on the nursing home's negligence existed prior to the passage of 2801-d."[29] Thus, restricting a resident who has filed a malpractice lawsuit from asserting a statutory claim based upon the same facts underlying the malpractice claim is consistent with and in no way thwarts the legislative purpose behind enactment of PHL § 2801-d.

PHL § 2801-d was also designed to provide residents with a means by which to enforce their rights as residents where existing law failed to provide an *effective* remedy.[30] In support of the bill, proponents argued that, although nursing home residents had a right to sue under common law theories of liability, the elderly population was vulnerable and often lacked the monetary resources to fund a lawsuit. The bill's sponsors sought to provide an incentive to "increase the willingness of patients and the legal profession" to file lawsuits by providing a specific statutory right of action, Medicaid-exempt minimum damage awards, and—significantly—the right to bring class action suits and recover attorneys' fees.[31] The goal was to increase "the potential recovery in a lawsuit . . . large enough to

encourage the private bar to bring suits on behalf of nursing home patients."[32]

Denying a resident the ability to pursue a statutory claim based on the same facts as a negligence cause of action does not undermine this legislative goal. Where a resident has a viable negligence or malpractice claim, the availability of a contingency fee arrangement eliminates concerns about a resident's lack of financial resources and provides incentive for attorneys to take on such cases.[33] Under such circumstances, the financial incentives offered by the statute are unnecessary, yet the statutory objective—ensuring that a resident has a viable means by which to pursue a claim—is satisfied. It is only where a resident does not have a pre-existing common law claim or where the alleged injury is *de minimis* that the statutory incentives are needed and helpful. Under those circumstances, restricting a resident to purely a statutory claim, with its built-in financial incentives, and compelling the resident to forgo the negligence or malpractice claim, in no way diminishes the efficacy of those incentives or undermines the goal of the statute.

Unintended Implications: Shifting the Burden of Proof and the Award of Attorneys' Fees

Permitting a nursing home resident to pursue a statutory claim based upon the same facts as a malpractice or negligence claim effectively shifts the burden of proof in negligence cases from plaintiffs to defendants. This shift, however, runs contrary to fundamental New York law, which places the burden of proving negligence squarely on plaintiffs.

It is fundamental that in a negligence case the plaintiff bears the burden of establishing a breach of duty on the part of the defendant.[34] Also, where a negligence claim is based on the violation of an agency regulation, that transgression merely constitutes "some evidence" of negligence, and is not conclusive of the issue as a matter of law.[35]

By contrast, under PHL § 2801-d, a patient need only prove a deprivation by a residential health care facility of "any right or benefit created or established for the well-being of the patient by the terms of any contract, by any state statute, code, rule or regulation or by any applicable federal statute, code, rule or regulation" (and a causal link between that deprivation and an injury to the patient). At that juncture, the burden shifts to the facility to prove, as an affirmative defense, that it "exercised all care reasonably necessary to prevent and limit the deprivation and injury for which liability is asserted . . ."[36]

Therefore, if a resident is permitted to assert a statutory claim based upon the same facts as a negligence claim and meet his burden of proof upon a mere showing of a violation by the facility of an agency rule or even a contract, in ordinary negligence cases the burden of proof would be shifted to defendants to establish, as an affirmative defense, that they complied with the standard of care. This "would significantly alter the traditional burden of proof requirements in a negligence action whenever injury is suffered by a patient in a health care facility . . . It is doubtful that this is what the legislature intended."[37] In the absence of a clear legislative intent to alter existing common law negligence principles, an interpretation of PHL § 2801-d that would permit such a result must be rejected.[38]

Permitting plaintiffs to assert a statutory claim based upon the same facts as an ordinary negligence claim would give rise to other implications that could not have been intended by the Legislature. For example, although attorneys' fees are not recoverable in negligence actions, they are authorized under PHL § 2801-d(6). Thus, in a routine negligence case, a resident can seek otherwise unobtainable attorneys' fees merely be advancing a statutory claim based on the same facts.

Significant Public Policy Considerations

Permitting plaintiffs to pursue statutory claims under PHL § 2801-d based upon the same facts as their negligence claims gives rise to public policy implications that justify proscribing such an approach.

Invocation of a Public Health Law claim in a negligence action enhances the possibility of a nursing home settling an otherwise defensible case or of an adverse jury verdict. In a negligence action where a Public Health Law claim is simultaneously pursued based upon the same facts, a plaintiff will attempt to introduce evidence of regulatory violations under the guise that such evidence is properly admitted in support of their statutory claim. This gives rise to the genuine likelihood that juries will confuse evidence of regulatory violations, no matter how trivial, with proof of negligence and unfairly conclude that a nursing home guilty of regulatory violations must be negligently run.[39] Not only does this dynamic increase the possibility of larger jury verdicts, but also, faced with this possible evidentiary confusion by juries, nursing homes have settled cases that were otherwise defensible and have paid higher settlements.[40] This, in turn, has led to enhanced litigation costs and insurance premiums and further strain on the limited resources of nursing homes. It also threatens the ability of nursing homes to maintain operations and provide adequate care to their residents.

As it is, due to strong patients' rights statutes, nursing homes have become the "new target of litigation" throughout the country.[41] Not only has there been dramatic increases in the number of lawsuits instituted, there has also been a tremendous increase in the size of awards.[42] As detailed in numerous reports and articles, this exponential surge in litigation has given rise to an insurance crisis that is plaguing the nursing home industry. Malpractice coverage has skyrocketed and the liability cost per bed has also increased.[43] In response to increased malpractice and litigation costs, many nursing homes have reduced or eliminated their liability insurance and some have even abandoned their operations.[44] The result has been to leave some residents without any care.[45] An overly expansive interpretation of PHL § 2801-d exacerbates this crisis.

Other costs are implicated where a plaintiff is permitted to assert a statutory claim with an ordinary negligence claim. The scope of discovery is rendered susceptible to fishing expeditions by plaintiffs looking for proof of any and all regulatory violations that may support the statutory claim. The scope of discovery in a negligence case can be easily distorted from the narrower inquiry of whether a duty toward a resident has been breached to whether the facility is guilty of any regulatory violations in any facet of its operations. Responding to such broad discovery gives rise to a time consuming and costly disruption of the day-to-day operation of a facility. These are the very dangers anticipated by various opponents of Bill No. S-6551, which was enacted as Public Health Law § 2801-d. The Federation of Protestant Welfare Agencies, Inc., wrote to the Senate and predicted that the Bill[] "open[s] the door to the possibility of numerous nuisance suits which, though ultimately dropped or found to be unfounded, would put the agency [and other not-for-profit and for-profit nursing homes] in jeopardy vis a vis its financial security, reputation, and smooth administration."[46]

Conclusion

It is doubtful that the Legislature, in seeking to protect vulnerable nursing home residents, intended to swing the pendulum so far and to jeopardize the survival of the nursing home facilities, which is a conceivable consequence of allowing residents to assert statutory and negligence claims based upon the same facts. It may well be that only the Legislature can resolve this debate, perhaps with a statutory amendment that requires an election of remedies by a resident. Until the statute is amended and clarified, however, this dispute will persist, with varying results depending upon the view of the individual judge hearing the case.

Endnotes

1. N.Y. Public Health Law § 2801-d(1).
2. *Morisett v. Terence Cardinal Cooke Health Care Center*, 8 Misc.3d 506, 509–510, 797 N.Y.S.2d 856 (Sup. Ct., N.Y. Co. 2005).
3. PHL § 2801-d(2).
4. PHL § 2801-d(6).
5. PHL § 2801-d(2).
6. PHL § 2801-d(4).
7. *See also Young v. A. Holly Patterson Geriatric Center*, 17 A.D.3d 667, 792 N.Y.S.2d 914 (2d Dep't 2005) (in action to recover damages for medical malpractice, court denied motion to amend to add PHL § 2801-d claim).
8. *See* 65 N.Y. Jur.2d Hospitals, § 45.
9. 134 Misc.2d 357, 510 N.Y.S.2d 984 (Sup. Ct., Monroe Co. 1987).
10. *Id.*
11. *Id.* at 360, 510 N.Y.S.2d at 986.
12. 4 Misc.3d 475, 778 N.Y.S.2d 666 (Sup. Ct., Monroe Co. 2004).
13. 778 N.Y.S.2d at 669.
14. 2004 WL 3261175 (Sup. Ct., Kings County).
15. 222 A.D.2d 1082, 635 N.Y.S.2d 841 (4th Dep't 1995).
16. 222 A.D.2d at 1084, 635 N.Y.S.2d at 842.
17. *But see Morisett v. Terence Cardinal Cooke Health Care Center*, 8 Misc.3d 506, 797 N.Y.S.2d 856 (Sup. Ct., N.Y. Co. 2005) (comprehensive decision by Justice Sklar in which he permitted statutory claim to be brought with negligence and lack of informed consent claims). *See also Spakoski v. Amsterdam Memorial Hospital Skilled Nursing Facility*, 6 Misc.3d 757, 789 N.Y.S.2d 408 (Sup. Ct., Montgomery County 2005) (court suggested that statutory claim may be brought in action for personal injuries suffered by resident in a fall); *Barnes v. Lawrence Nursing Care Center*, 2 Misc.3d 337, 773 N.Y.S.2d 208 (Sup. Ct., Kings Co. 2003) (claim for damages for conscious pain and suffering was predicated, in part, on alleged violation of PHL § 2801-d).
18. 303 A.D.2d 102, 755 N.Y.S.2d 769 (4th Dep't 2002).
19. *Id.* at 110, 755 N.Y.S.2d at 775.
20. 775 N.Y.S.2d at 776.
21. 778 N.Y.S.2d at 669 (the Fourth Department in *Doe* "did not overrule Goldberg").
22. 300 A.D.2d 178, 753 N.Y.S.2d 450 (1st Dep't 2002).
23. *See id.* at 179, 753 N.Y.S.2d at 452.
24. *Id.*
25. 309 A.D.2d 1132, 766 N.Y.S.2d 241 (3d Dep't 2003).
26. *People v. Santi*, 3 N.Y.3d 234, 243, 785 N.Y.S.2d 405 (2004).
27. *People v. Allen*, 92 N.Y.2d 378, 383, 681 N.Y.S.2d 216 (1998).
28. *Begandy v. Richardson*, 134 Misc.2d 357, 361, 510 N.Y.S.2d 984 (Sup. Ct., Monroe Co. 1987).
29. 510 N.Y.S.2d at 986.
30. *See Begandy v. Richardson*, 134 Misc.2d 357, 510 N.Y.S.2d 984 (Sup. Ct., Monroe Co. 1987).
31. *See* 1975 Senate Rep. No. 6551-B; Memo of State Executive Department, reprinted in 1975 McKinney's Session Laws of New York, at 1685–1686. *See also* Daniel M. Gitner, Nursing the Problem: Responding to Patient Abuse in New York State, 28 COLUM J. L & SOC. PROBS. 559, 597–599 (1995) ("These provi-

sions help overcome tort law's inadequacy in dealing with nursing home patient abuse" by "allowing for a minimum recover, attorney's fees, class actions, punitive damages, and the possibility of suing the nursing home.").

32. 1975 Senate Rep. No. 6551-B, at 1, par.2 ("Summary of Provisions); *Begandy v. Richardson*, 134 Misc.2d 357, 360–361, 510 N.Y.S.2d 984 (Sup. Ct., Monroe Co. 1987). *See also Jacobs v. Newton*, 1 Misc.3d 171, 181, 768 N.Y.S.2d 94 (Civil Ct., Kings Co. 2003) ("clear intent of [this statute] was to expand the existing remedies for conduct that, although constituting grievous and actionable violation of important rights, did not give rise to damages of sufficient monetary value to justify litigation").
33. *See Begandy v. Richardson*, 134 Misc.2d 357, 361, 510 N.Y.S.2d 984 (Sup. Ct., Monroe Co. 1987).
34. *See Derdiarian v. Felix Constr. Corp.*, 51 N.Y.2d 308, 314–315, 434 N.Y.S.2d 166 (1980); *La Fountain by La Fountain v. County of Clinton*, 237 A.D.2d 808, 654 N.Y.S.2d 870 (3d Dep't 1997).
35. *Long v. Forest-Fehlhaber*, 55 N.Y.2d 154, 160, 448 N.Y.S.2d 132 (1982).
36. PHL § 2801-d(1).
37. *Begandy v. Richardson*, 134 Misc.2d 357, 510 N.Y.S.2d 984, 985–986 (Sup. Ct., Monroe Co. 1987).
38. *See Seligman v. Friedlander*, 199 N.Y. 373, 376, 92 N.E. 1047 (1910), *cited in Lurene F. v. Olsson*, 190 Misc.2d 642, 645, 740 N.Y.S.2d 797 (Sup. Ct., Broome Co. 2002).
39. *See* "Diagnosing the Nursing Home Liability Insurance Crisis, A Case for Reforming the System," William J. Warfel, CPCU Society (Jan. 2003 Newsletter).
40. *Id.*
41. *See* R. Patrick Bedell, The Next Frontier in Tort Reform: Promoting the Financial Solvency of Nursing Homes, 11 ELDER L.J. 361 (2003), at 371.
42. *See* study issued on July 25, 2002 by the United States Department of Health and Human Services, entitled, "Confronting the New Health Care Crisis: Improving Health Care Quality and Lowering Costs by Fixing Our Medical Liability System."
43. *See also* R. Patrick Bedell, The Next Frontier in Tort Reform: Promoting the Financial Solvency of Nursing Homes, 11 ELDER L.J. 361 (2003), at 369–374.
44. *Id.*
45. *Id. See also* "Nursing Home Liability Insurance Crisis," Richard S. Biondi, August 10, 2005 (www.milliman.com).
46. *See* Memo. of Fed. of Protestant Welfare Agencies, Inc., dated June 23, 1975.

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