TODAY’S TOPICS:

• The Law:
  – Unfair and Deceptive Trade Practices
  – Breach of contract
  – Fraud

• Key Risk Areas in Marketing Your Community
  – Pricing and Rates
  – SCU
  – Staffing
  – Religion/Faith-Based Focus
  – Other “no-no’s”
Today’s Presenters

• Ken Burgess, Poyner Spruill Health Law Section
• Iain Stauffer, Poyner Spruill Health Law Section
NC’S UNFAIR AND DECEPTIVE TRADE PRACTICES ACT
What the Law Prohibits

• Purpose of the UDTP statutes:
  – intended to protect aggrieved customers and consumers from unethical behavior by businesses with whom they transact

• What is unlawful:
  – Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce
Related Laws

• Breach of contract
  – Promises made/promises broken
• Fraud under various state and federal statutes and N.C. court decisions
• Federal anti-discrimination housing laws (HUD)
  – Prohibit discrimination based upon race, ethnicity, sex, disability, religion, national origin
  – Whole body of law regarding disability limits and preadmission screenings
• You can limit to over 55 or over 62—your choice
  – The 80% rule for age limits
Taken Together, These Laws Prohibit

• Making a promise or commitment
• Or statements that “reasonable person” could construe as promise/commitment
  – Reasonable person = jury or judge
• Upon which a consumer reasonably relies
• To their detriment
• Which turns out to be, and can be proven to be, untrue or misleading
• Strict liability standard—no intent to discriminate is required under Federal Fair Housing Laws
Damages For False/Untrue Marketing & Advertising

- What are the damages?
  - They vary based upon the nature of the claim
  - Unfair and Deceptive Trade Practice Claim
    - Treble damages
  - Contract
    - Actual damages, but they can be broad
  - Fraud
    - Often punitive and/or treble damages
Why This Topic, Now?

• Tort reform
  – Has limited non-economic damages for normal medical negligence cases—including AL care
    • $500,000 cap on “pain/suffering” and other damages that aren’t “out of pocket” losses like medical treatment
• So, plaintiffs and their lawyers are looking for new, creative ways to obtain damages from providers
• These “lying/fraud” theories are attractive because of treble damages/punitive damages
Puffing Versus Lying

• Puffing, or reasonable descriptions of your community are okay
• Falsehoods, deceptive statements are not
• The line = often in the beholder’s eye
  – Reasonable person standard
• Knowing when you’ve crossed the line = mushy
• Beware objective statements that can be disproven
  – Highest staffing in any NC AL community
  – Best staff in town
  – Fewer falls than any of our competitors
PITFALLS IN MARKETING
PRICING AND RATES
Pricing and Rates

• What does the rule say?
• 10A N.C. Admin. Code 13F .0704(a)(1)(A)
  – the resident contract “shall specify rates for resident services and accommodations, including the cost of different levels of service, if applicable and any other charges or fees.”
• and (D)
  – “the resident or responsible person shall be notified as soon as any change is known, but not less than 30 days before the change for rate changes initiated by the facility, of any changes in the contract and be provided an amended contract or an amendment to the contract for review and signature.”
Pricing and Rates

• Question:

– whether a facility must give a 30-day advance written notice each time a resident’s total charges increase where the increase is driven not by changes in a facility’s standard, published rates, but solely by an increase in a resident’s level of care where the charges for the applicable level of care were provided to and known by the resident or responsible person and those level-based charges have not increased
Pricing and Rates

• Answer: No, if the community –
  (1) has established the varying charges for the different levels of care in advance;
  (2) has provided those rates to the resident or her responsible person, if applicable;
  (3) is providing an increased level of care to the resident; and
  (4) is simply applying those predetermined charges to the resident based upon her increased level of care needs.
Pricing and Rates

• Residents have the right to know in advance what they will be charged, or can potentially be charged, based upon:
  
  (1) the core package of housing and services they select;  
  (2) any additional or a la carte services or products they select; and  
  (3) any potential level of care increases they may experience while at the community.
MARKETING OF SPECIAL CARE UNITS
Special Care Units

• Typical advertisement and community title:
  – Burgess Memory Care Community
  – Oceanside Assisted Living and Memory Care
  – “Special programs for Alzheimer’s residents”
  – “Wandering residents are our specialty”
  – “Staff are specially trained in dealing with memory care disorders”

• SCU “markers” can be in Community title, brochures, telephone “on hold” message, website

• That’s all “marketing”
Special Care Units

• The law and DHSR position on this is changing
• Old DHSR position—you cannot hold yourself out to the public, via any medium, as having a memory care unit unless you have a Special Care Unit designation on your license
• The moratorium on SCU licenses
  – DHSR cannot issue SCU license in AL or SNF settings
  – Unless provider applies for an “exception” through defined process
  – Appears to be in current pending legislation to continue
Special Care Units

• Current Adult Care Licensure Section Position:
  – You can state/advertise/hold yourself out as having:
    • Memory care services and programs
    • A memory care unit
    • You can even say “Special Care Unit”
  – As long as you don’t say licensed Special Care Unit
  – For that designation, you must go through the DHSR SCU Moratorium Exceptions Process

• The rule in SNFs and combo facilities operating under the SNF regulations is different—still holds to the “old” position described above
Special Care Units

• How people get “caught” on this issue:
  – Competitors rat you out
    • “I went through the Exemptions Process and they should also”
  – Surveyors or ombudsman call up and get your on-hold waiting message that mentions you memory care unit
  – Surveyors or ombudsman (or plaintiff’s lawyer) scours your website
MARKETING CAUTION: STAFFING LEVELS AND EXPERTISE
Staffing: Special Area of Focus

• Staffing-based lawsuits pending all over US and NC
• Since N.C. AL statues contain minimum staffing standards
  – It’s tempting for plaintiffs’ lawyers to file suits alleging failure to meet minimum standards
    • Expensive lawsuits with massive/painful discovery
    • At least 2 pending in N.C. since 2016
    • They seek/obtain staffing records, sign in sheets, PCS billing records, payroll records AND STAFF STATEMENTS
• Advertising your staffing levels as “above minimums,” or “higher than required”, etc. is dangerous unless it’s true
Staffing: Special Area of Focus

- Also, advertising about special training, skills of staff is risky unless true
- Such ads must be:
  - Accurate and true
  - At all times – think about your shift staffing levels
  - Provable by you
Other Marketing Traps & Potential Pitfalls

• Religious and faith-based communities
  – Using a religious/faith-based name in your community name is frowned upon by HUD UNLESS you have prominently displayed a disclaimer that all races, genders, religions, etc. are welcome

• Open displays of religious symbols likewise tricky unless you permit others

• You can describe your community:
  – Chapel on campus
  – Kosher meals offered
Miscellaneous Marketing Traps

• Use of human models that suggest a preference for certain races
• Advertising on select geographic areas only that isn’t racially diverse
• Beware overly-flowery language
• Using pictures of daily life
  – Ensure diversity
  – No hidden messages
  – Ensure HIPAA compliance if using real current or former residents/families
    • Having a valid consent that doesn’t expire
Practical Tips

• Sensitize your marketing staff
• Regular, ongoing training
• Periodic review of marketing materials including:
  – Website
  – Brochures
  – Social media
  – On-hold phone messages
  – In-person talking points
• Avoid “meets or exceeds” language
Practical Tips

• Keep your marketing documents separate for AL and Independent Living
  – Recall the N.C. limits on who can live in an IL, or Multi-unit Housing With Services facility versus when you must move to AL
• If you have combined IL/AL marketing tools, be VERY clear about what statements/services/promises and representations apply to IL only or AL only or both
• Give plenty of advance notice for material changes in services/costs and then UPDATE your marketing
• Marketing staff review HUD guidelines online
QUESTIONS?
UPCOMING WEBINARS

• August 22, 2019: Hot Topics in Privacy and Data Security
• October 17, 2019: Responding to Subpoenas, Record Requests, and Investigations in Long-term Care
• Register for upcoming webinars at:
  – https://www.ncala.org/training/