



Regulatory Catch 22: Creating a Litigation Super Fund

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Plaintiff Attorneys Become The Unintended Benefactor of Regulations Designed To Help The Elderly

In the nursing home industry, quality-of-care is generally graded by compliance with standards dictated in a voluminous regulatory matrix found in Title 42 of the U.S. Code of Federal Regulations and Title 22 of the California Code of Regulations.

These regulations are decidedly specific in detailing the level and type of health care services required for any facility to qualify for government medical reimbursement programs. As most facilities serve a patient population that depends at least in part on these subsidy payments, adherence to this regulatory scheme is a business reality. Although regulatory compliance should focus on maintaining quality care, the virtual sea of regulations involved has been successfully tapped by the plaintiff's bar for use as evidence to support allegations of fraud brought against nursing home operators.

As a consumer we are taught, "buyer beware." A salesman's statement that his product is the "best" is considered mere "puffing" when made by a car manufacturer. A similar statement made inside a nursing home brochure however, can be used as evidence of fraud when compared against a bevy of regulatory citations. Although state investigators evaluate on a scale that utilizes "substantial compliance" as the

benchmark, a "zero tolerance" threshold is that argued in the courtroom. When successful, corporate malfeasance becomes the target and traditional MICRA protections generally afforded healthcare practitioners are pierced leaving these elder care providers exposed to outrageously high jury awards. In the last year we have been shocked by multi-million dollar verdicts against nursing home operators nationwide with at least one jury award topping \$78 million.

Compliance with all federal and state regulations is a difficult task and is particularly challenging when coupled with the high staff turnover and widespread nursing shortage presently evidenced throughout the nursing home industry. In order to meet increasingly higher staff to patient ratio requirements, nursing homes are often forced to supplement their staff with overtime shifts or per diem personnel who are not familiar with the facility or its patients. Staffing ratios can be frustrated, despite best efforts, by an inadequate pool of nurses from which to draw and inherent limits on compensation caused by low paying government reimbursement programs. For the attorney willing to invest in the search, disgruntled former employees abound in this financially strapped industry.

In addition to the sheer volume of regulations involved, many individual code sections contain multiple duties. Where the

performance of these duties is either overlooked or otherwise not documented by the nursing home staff, regulatory citations are issued by the Department of Health Services whose investigations and facility surveys are a matter of public record. Although citations are graded on a scale that assesses the scope and severity of the infraction, any citation has the potential of becoming evidence to support the personal injury lawsuit, regardless of the relationship of the specific citation to a specific plaintiff. "Profits over people" is the mantra pounded like a marching drum in an evidentiary parade of regulatory violations that focuses on establishing a fraudulent "pattern of practice" as opposed to any single failure. The role of government investigators charged with enforcing regulatory compliance is generally that of watchdog for "quality improvement." To the plaintiff's attorney, however, "punishment" is the order of the day as multiple citations and other legally required adverse reporting are stacked in front of a lay jury in a microscopic review of facility-wide management. The resulting litigation landscape confronting the nursing home industry today is yet another challenge to its financial survival.

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