

GOVERNMENTAL RESPONSES TO ELDER ABUSE AND NEGLECT IN NURSING HOMES: THE CRIMINAL JUSTICE SYSTEM AND THE CIVIL FALSE CLAIMS ACT

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Elder abuse has become an increasingly serious problem in America's nursing homes. Despite both state and federal efforts to remedy the situation, the abuse of elders in nursing homes continues to rise. In this article, Michael J. Davidson examines the legal tools available to the government to help end the harm being inflicted on America's elders. Specifically, Mr. Davidson argues for an increased role for elder-specific criminal statutes in the criminal justice system and greater use of the civil False Claims Act to curb elder abuse in America's nursing homes.

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The author wishes to thank Professor Charles Sabatino for his assistance in the preparation of this article.

I. Introduction

The United States has an increasingly elderly population. During the last century, the number of Americans who live to be at least sixty years old has increased four fold.¹ Reports from the U.S. Census Bureau estimate that there will be approximately sixty-two million persons over sixty-five years old in this country by 2025, a seventy-eight-percent increase from 2001.² As our elderly population advances in age, many will require some form of long-term care. A significant percentage of these elderly Americans will eventually reside in nursing homes.³

Unfortunately, America's senior citizens are oftentimes the victims of various forms of abuse, including physical assault, financial exploitation, and serious neglect.⁴ Nursing home residents are some of the most vulnerable victims because physical and mental ailments make them particularly susceptible to abuse and incapable of either defending themselves or reporting misconduct to the proper authorities. State and federal governments have taken a number of legal steps to prevent or punish elder abuse in nursing homes, but they have largely failed to remedy the problem.

This article will focus on two of the more severe and controversial approaches used by state and federal governments to confront elder abuse in nursing homes: (1) the criminal justice system and (2) the application of the civil False Claims Act (FCA) to quality of care cases. To date, neither approach has enjoyed widespread application or success, but the FCA—both state and federal—holds great promise as an effective means of combating the problem through its use of financial incentives for whistleblowers and the FCA's broad remedial scheme.

1. Gregory C. Larson & Melissa Hauer, *Planning for Nursing Home Care in North Dakota*, 74 N.D. L. REV. 191, 193 (1998).

2. Kevin McCoy & Barbara Hansen, *Havens for Elderly May Expose Them to Deadly Risks*, USA TODAY, May 25, 2004, at 10A.

3. Some experts estimate that "as many as forty-three percent of people sixty-five years old will eventually need nursing home care and as many as twenty-four percent of those are expected to spend a year or longer in a nursing home, with nine percent spending as long as five years." Larson & Hunter, *supra* note 1, at 193.

4. Nat'l Ctr. on Elder Abuse, *Frequently Asked Questions: How Many People Are Suffering from Elder Abuse*, at <http://www.elderabusecenter.org/default.cfm?p=faqs.cfm> [hereinafter *How Many People Are Suffering from Elder Abuse*].

II. The Elder Abuse Problem

Elder abuse is a significant, although largely underreported, problem in the United States. It is estimated that as many as five million elderly Americans are abused each year, and the incident rate may be rising. Furthermore, government officials estimate that as little as ten percent of crimes against elderly members of our society are reported.⁵

No definitive definition of elder abuse exists, and the legal definition of that term differs by jurisdiction. The National Center on Elder Abuse defines elder abuse as "any knowing, intentional, or negligent act by a caregiver or any other person that causes harm or a serious risk of harm to a vulnerable adult."⁶ Broadly defined, the term includes:

Physical Abuse—Inflicting, or threatening to inflict, physical pain or injury on a vulnerable elder, or depriving them of a basic need.

Emotional Abuse—Inflicting mental pain, anguish, or distress on an elder person through verbal or nonverbal acts.

Sexual Abuse—Non-consensual sexual contact of any kind.

Exploitation—Illegal taking, misuse, or concealment of funds, property, or assets of a vulnerable elder.

Neglect—Refusal or failure by those responsible to provide food, shelter, health care or protection for a vulnerable elder.

Abandonment—The desertion of a vulnerable elder by anyone who has assumed the responsibility for care or custody of that person.⁷

Elder abuse and neglect problems extend into the nursing home industry. In 1999, the Committee on Finance of the U.S. Senate reported that there existed approximately 1.7 million "highly vulnerable . . . elderly and disabled individuals" residing in some 17,000 nursing homes, of which "poor quality of care at about 15 percent . . . caused actual harm to residents, such as worsening pressure sores or

5. Tom Humphrey, *Nichols Seeks Stiffer Laws Against Elder Abuse; Knox Attorney General Says State Needs to Get Tough on Scam Artists*, KNOXVILLE NEWS-SENTINEL (Knoxville, Tenn.), Nov. 6, 2003, at A1 (Knox County District Attorney General said "research indicates only about 1 out of 10 crimes against the elderly are now reported to authorities and convictions are difficult to obtain."); see also Victoria A.F. Camron, *Abuse of Elders Goes Unreported, Committee Says; Group's Goal Is Prevention*, CHI. TRIB., Mar. 24, 2004, at 2 ("Officials estimate only one in 10 cases is reported . . ."); John Morrison, *Fraud and the Elderly*, MONT. LAW., Mar. 2003, at 5 ("An estimated 84 percent of elder abuse cases are not reported.").

6. Nat'l Ctr. on Elder Abuse, *Frequently Asked Questions: What Is Elder Abuse?*, at <http://www.elderabusecenter.org/default.cfm?p=faqs.cfm>.

7. *Id.*

untreated weight loss, or had placed them at risk of death or serious injury.”⁸ Further, it reported an increased concern that nursing home residents were being subjected to physical abuse; “pushed, slapped, beaten, and otherwise assaulted—by the individuals to whom their care has been entrusted.”⁹

Similarly, in a 2001 congressional report prepared for Congressman Henry Waxman, researchers found that between January 1999 and January 2001, more than thirty percent of nursing homes had at least one reported incident of abuse that could have resulted in harm to a resident, and almost ten percent of nursing homes “were cited for abuse violations that caused actual harm or placed residents in immediate jeopardy.”¹⁰ However, the Report opined that the number of actual violations could be much higher because of deficiencies in the reporting process and the fact that those nursing homes that did not receive Medicaid or Medicare were not subject to the inspections mandated by federal law.¹¹

The Waxman Report identified a number of startling findings. The third most common form of abuse violation, which occurred in twenty percent of the homes (1,009 nursing homes), “was the failure to protect residents from sexual, physical, or verbal abuse, corporal punishment, or involuntary seclusion.”¹² The Report contained several examples of such abuse. In one particularly egregious example, “an eighty-year-old stroke victim suffering from dementia and impaired short and long-term memory was violently abused on repeated occasions.”¹³ This particularly vulnerable resident had been attacked by another resident at the instigation of facility employees.¹⁴ The eld-

8. GEN. ACCOUNTING OFFICE, REPORT NO. GAO-03-561, NURSING HOME QUALITY: PREVALENCE OF SERIOUS PROBLEMS, WHILE DECLINING, REINFORCES IMPORTANCE OF ENHANCED OVERSIGHT 1 (2003) (citation omitted).

9. GEN. ACCOUNTING OFFICE, REPORT NO. GAO-02-312, NURSING HOMES: MORE CAN BE DONE TO PROTECT RESIDENTS FROM ABUSE 1 (2002).

10. MINORITY STAFF, U.S. HOUSE OF REPRESENTATIVES COMM. ON GOVERNMENT REFORM, ABUSE OF RESIDENTS IS A MAJOR PROBLEM IN U.S. NURSING HOMES 4–5 (Comm. Print 2001), available at <http://www.elderabusecenter.org> [hereinafter WAXMAN REPORT]. The report was based on two databases maintained by the U.S. Department of Health and Human Services (HHS), one dealing with state nursing home inspection results and the other containing the results of state investigations based on nursing home complaints. *Id.* at 2.

11. *Id.* at 8.

12. *Id.* at 5.

13. *Id.* at 10.

14. *Id.* The facility employees used cigarettes to bribe “a brain-damaged fifty year-old resident to attack the eighty year-old resident.” *Id.*

erly gentleman was also “locked in a bathroom, hit with a belt, dragged on his knees, and hit in the head with a book by nursing home employees.”¹⁵ Because of his memory impairment, the victim was unable to report his mistreatment, and the abuse only came to light after another employee reported it.¹⁶

Also potentially disturbing was the Report’s finding that reported incidents of elder abuse were on the rise, tripling between 1996 and 2001; though, the researchers could not determine if the increased reports were a result of better reporting and increased enforcement activities, or simply because residents were being abused at an increased rate.¹⁷ As a summary finding, the Report posited “that abuse of nursing homes residents is a widespread and serious problem.”¹⁸

The potential causes for nursing home elder abuse are varied.¹⁹ However, in many elder abuse cases, the problem ultimately appears attributable to inadequate staffing. A 1981 congressional report found that many nursing home care providers are “often ill-trained, grossly overworked, and very poorly paid.”²⁰ More than three decades later the same problems exist. A 2001 Department of Health and Human Services (HHS) study found “strong and compelling evidence of the relationship between staffing ratios and quality of nursing home care.”²¹ Anecdotal evidence indicates that a contributing factor to instances of physical abuse²² and neglect²³ by nursing home workers is an overwhelming workload.

15. *Id.*

16. *Id.*

17. *Id.* at 6–7.

18. *Id.* at 4.

19. Cf. Alisa LaPolt, *DCF Failing to Protect State’s Seniors, Investigation Finds*, NEWS-PRESS (Ft. Myers, Fla.), Sept. 7, 2003, at 12A (“A 2000 report by the Virginia State Crime Commission noted many possible motives [for caregivers to murder]: murder for profit, relief of care-giving duties, revenge, even ‘malicious elder-cide.’”).

20. William E. Adams, Jr., *The Intersection of Elder Law and Criminal Law: More Traffic than One Might Assume*, 30 STETSON L. REV. 1331, 1339 (2001).

21. See Mike Masterson, *Nursing Home Survey Shocking*, ARK. DEMOCRAT GAZETTE, Dec. 16, 2003, at 19 (“92 percent of Arkansas facilities fell well short of the federal minimum staffing levels for nursing homes, a key indicator for quality of care.”); Bill Sizemore, *Nursing Home Safety, Care Violations Widespread in Virginia’s Tidewater Area*, THE VIRGINIAN-PILOT (Norfolk, Va.), Apr. 28, 2003, at 2003 WL 19373330, at 3.

22. See, e.g., State v. Kuhne, No. E2000-02269-CCA-R3-CD, 2001 WL 1168196, at *1 (Tenn. Crim. App. Oct. 4, 2001) (Nineteen-year-old nursing home employee, convicted of assaulting a resident, attributed her conduct in part, to “her frustration with her co-workers who would not help her with her overwhelming workload.”); *Bucks Nursing Aide Sentenced for Murder*, PHILA. DAILY NEWS, Nov. 25,

If this premise is correct, then states such as Virginia are ripe for nursing home elder abuse. Virginia ranks in the bottom of the country for Medicaid funding, making it financially difficult for nursing homes to afford a sufficient number of quality caregivers.²⁴ In portions of Virginia, nurse aides earn as little as seven dollars an hour and some aides reported being required “to care for as many as 20 patients on the day shift and up to 35 at night.”²⁵ One Virginia State Senator stated that because of inadequate staffing, “[w]e’re going to have more abuse, more neglect, more bedsores . . .”²⁶

State and federal governments have taken a number of steps to prevent or curb elder abuse. For example, the vast majority of states have enacted some form of statute mandating the reporting of elder abuse,²⁷ and all states possess laws that contain some provision addressing protections against elder abuse.²⁸ Federal law requires skilled-nursing facilities to follow certain standards of care and specific operating guidelines, and to follow state and federal regulations, including the comprehensive Medicare regulations.²⁹ The Medicare regulations require, in part, individualized care plans and an adequate staff “to provide nursing and related services to attain . . . the highest practicable physical, mental, and psychological well-being of each resident.”³⁰ These regulations also apply to nursing homes par-

2003, at 14 (“Prosecutors had said [defendant], tired from working a double shift and suffering from depression and anxiety, had kicked or stomped [the resident] after he soiled his bed.”).

23. See, e.g., Sizemore, *supra* note 21, at 9 (An elderly resident, improperly fed through a tube, was hospitalized for aspiration pneumonia and eventually died. “The nurse on duty told the inspector she felt ‘overwhelmed with the nursing care responsibility for 43 residents,’ 11 of them tube-fed, with only one aide to help her.”); cf. Masterson, *supra* note 21, at 1 (“Too often, too many castoff parents and grandparents—and those without relatives—are left to face agonizing deaths under the watch of caring but grossly overworked strangers.”).

24. Sizemore, *supra* note 21, at 5. In 2001, Virginia “ranked 47th in per capita Medicaid nursing-home spending.” *Id.*

25. *Id.* at 4.

26. *Id.* at 3.

27. Adams, *supra* note 20, at 1338 (“An overwhelming majority of states have passed some form of the mandatory reporting scheme.”); see Jerold E. Rothkoff, *Litigating Nursing Home Abuse and Neglect Cases*, N.J. LAW., Apr. 2002, at 14 (“New Jersey requires mandatory reporting of elder abuse in institutional settings.”).

28. Adams, *supra* note 20, at 1340 (“By 1991, all fifty states had enacted some type of protection against elder abuse, but the approaches varied.”).

29. United States *ex rel.* Swan v. Covenant Care, Inc., 279 F. Supp. 2d 1212, 1220 (E.D. Cal. 2002) (citing various provisions of the Social Security Act, 42 U.S.C. § 1395, and implementing regulations).

30. *Id.* (citing 42 C.F.R. §§ 483.30, 483.75(1) (2001)).

ticipating in the Medicaid program.³¹ For nursing facilities that fail to satisfy quality of care guidelines, the HHS may deny payment, impose civil remedies, require temporary government management of the facility, or close the facility.³²

However, many of these protective measures have proven inadequate to address elder abuse problems. In 2002, GAO reported that civil monetary penalties and termination from the Medicare/Medicaid programs were rarely recommended for problematic nursing homes.³³ Many government officials are hesitant to take action against nursing homes that might put them out of business because of the possible impact such action may have on the homes' residents.³⁴

III. Criminal

Elder abuse and neglect may be of such severity as to warrant criminal sanction. However, no uniform approach to the criminalization of such misconduct exists. The specific response of the criminal justice system varies by jurisdiction. Of those states with criminal elder abuse or neglect laws, some criminalize only the failure to report abuse, some address only physical abuse, and some criminalize both physical and emotional abuse.³⁵ Some jurisdictions, such as the federal system, primarily address elder abuse through sentence enhancements.³⁶ However, there are few reported federal cases specifically addressing abuse of the elderly in nursing homes, particularly physical abuse.

31. 42 C.F.R. §§ 483.1(b) (Scope), 483.5 (Facility Defined), 483.30 (Nursing Services) (2003).

32. *Id.* § 488.406.

33. GEN. ACCOUNTING OFFICE, *supra* note 9, at 5.

34. Sizemore, *supra* note 21, at 2 ("Government regulators allow poorly performing nursing homes to continue operating because, they say, closing them would traumatize their residents and possibly leave them with nowhere else to go."); John Solomon & Katherine Pfleger, *Avoiding Federal Debarment*, WASH. POST, Aug. 21, 2000, at A19 ("Many health care companies, such as nursing homes accused of defrauding Medicare, are not banned because officials fear their patients will be penalized.").

35. Adams, *supra* note 20, at 1340. States that criminalize both physical and emotional abuse require the prosecution to establish "the victim's mental anguish." *Id.*

36. See *id.* at 1337 n.41.

A. Federal Criminal Law

No federal criminal statute specifically addresses elder abuse. Crimes against the elderly are prosecuted under the more generic provisions of the criminal code. To illustrate, telemarketing scams that target the elderly have been prosecuted under the federal conspiracy and wire fraud statutes.³⁷ Billing Medicare for services not rendered to nursing home residents has been prosecuted as a criminal false claim.³⁸ Abusing a power of attorney to financially exploit an elderly relative, who had been moved to a nursing home following a stroke, resulted in convictions for mail fraud and for filing false income taxes.³⁹

Although no federal statute specifically criminalizes crimes against the elderly, the federal system does consider a victim's aged status when determining an appropriate sentence. In the federal system, criminal sentences are determined through use of the Federal Sentencing Guidelines.⁴⁰ The first step in a sentence calculation is to determine the applicable offense guideline section and base offense level associated with the specific offense.⁴¹ Specific offense characteristics are then considered to determine if the offense level should be increased.⁴² The court may adjust the offense level upward or downward to reflect various circumstances, such as the role of the defendant in the crime, or his or her acceptance of responsibility.⁴³ Defendants with prior convictions may have their criminal history category

37. 18 U.S.C. §§ 371, 1343, respectively in *United States v. O'Neil*, 118 F.3d 65, 75 (2d Cir. 1997) ("Victims of this scheme primarily were individuals in their sixties, seventies and eighties.").

38. 18 U.S.C. § 287. See generally *United States v. Hoogenboom*, 209 F.3d 665 (7th Cir. 2000) (false Medicare claims submitted for therapy never rendered to elderly and mentally ill residents of "retirement homes.").

39. Becky Bohrer, *Man Gets Two Years Prison in Elder Abuse Case*, ASSOC. PRESS NEWSWIRES, Oct. 2, 2002, available at 10/9/02 APWIRES 18:07:00 ("in a case the U.S. Attorney called the first federal prosecution of financial elder abuse in Montana").

40. U.S. SENTENCING GUIDELINES MANUAL § 1A1.1 (2003). On January 12, 2005, the Supreme Court held that the Sentencing Guidelines were merely advisory, but that courts were still required to "consider Guideline ranges." *United States v. Booker*, 2005 WL 50108, at *16 (Jan. 12, 2005). Further, the Court held that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." *Id.* at *15. The vast remainder of the federal sentencing scheme remains valid. *Id.* at *24.

41. U.S. SENTENCING GUIDELINES MANUAL § 1B1.1(a), (b) (2003).

42. *Id.* § 1B1.1(b).

43. See generally *id.* Ch. 3.

increased to reflect the prior misconduct.⁴⁴ The sentencing guideline range is then determined by locating the point on the Sentencing Table that corresponds with both the defendant's criminal history category and offense level.⁴⁵ In unusual cases, the court may depart from the sentencing guideline range.⁴⁶

At least two sections of the Guidelines permit an increase in sentences for crimes against the elderly.⁴⁷ Chapter 3 of the Guidelines provides for an upward adjustment to reflect the vulnerability of a victim.⁴⁸ Specifically, section 3A1.1 provides that the offense level should be increased by two levels “[i]f the defendant knew or should have known that a victim . . . was a vulnerable victim.”⁴⁹ A “vulnerable victim” is defined to include someone who is “unusually vulnerable due to age.”⁵⁰ When determining vulnerability, the courts focus “on the extent of the individual’s ability to protect himself from the crime.”⁵¹ In other words, was the particular victim “less likely to thwart the crime”?⁵²

Merely being elderly does not render a victim unusually vulnerable for the Guidelines purposes.⁵³ The sentencing court must consider both the “victim’s individual vulnerability” and “the totality of the circumstances, including the status of the victim and the nature of the crime.”⁵⁴ However, “courts frequently have found elderly indi-

44. *Id.* § 1B1.1(f).

45. *Id.* § 1B1.1(g).

46. *Id.* § 1B1.1(i).

47. In comparison, the Guidelines note that as a matter of policy, the age of the defendant is not normally a relevant sentencing factor. *Id.* § 5H1.1. However, the defendant’s “[a]ge may be a reason to impose a sentence below the applicable guideline range when the defendant is elderly and infirm and where a form of punishment such as home confinement might be equally efficient as and less costly than incarceration.” *Id.*; see, e.g., United States v. Hilderbrand, 152 F.3d 756, 767 (8th Cir. 1998) (district court did not abuse its discretion in granting a significant downward departure to a seventy-year-old defendant with “life-threatening health conditions”).

48. See generally U.S. SENTENCING GUIDELINES MANUAL § 3A (2003).

49. *Id.* § 3A1.1(b)(1).

50. *Id.* § 3A1.1, Cmt. n.2.

51. United States v. O’Neil, 118 F.3d 65, 75 (2d Cir. 1997); see also United States v. Fosher, 124 F.3d 52, 55–56 (1st Cir. 1997) (“concerned with the impaired capacity of the victim to detect or prevent the crime”).

52. *Fosher*, 124 F.3d at 56.

53. O’Neil, 118 F.3d at 75; see also United States v. Tissnolthtos, 115 F.3d 759, 761 (10th Cir. 1997); United States v. Blake, 81 F.3d 498, 504 (4th Cir. 1996).

54. United States v. Gonzalez, 183 F.3d 1315, 1327 (11th Cir. 1999) (citing United States v. Tissnolthtos, 115 F.3d 759, 762 (10th Cir. 1997)). But cf. United States v. Sims, 329 F.3d 937, 944 (7th Cir. 2003) (“[N]o other factor need accompany age so long as the victim’s vulnerability is related to the victim’s age.”).

viduals unusually vulnerable to telemarketing fraud schemes,⁵⁵ investment frauds,⁵⁶ and physical assaults.⁵⁷ In the nursing home context, at least one court increased a sentence to reflect the vulnerability of the victims when the defendant targeted nursing home residents for investment schemes.⁵⁸

Given that nursing home residents are, almost by definition, vulnerable victims for purposes of physical abuse and financial exploitation, a liberal application of this sentencing adjustment seems appropriate in the nursing home context. Indeed, in cases of physical abuse in particular, a vulnerable victim increase to the offense level should normally be presumed during sentencing.

Another sentencing option in cases in which the circumstances surrounding nursing home elder abuse are particularly egregious is the upward departure. Chapter 5 of the Guidelines addresses departures and permits the court to depart upward or downward from the Guidelines' range when circumstances exist "of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the Guidelines that . . . should result in a sentence different from that described."⁵⁹ This provision allows the court to increase the defendant's sentence "if an aggravating factor or circumstance is present to an exceptional degree or is of a kind not adequately taken into consideration by the Sentencing Guidelines."⁶⁰ In

55. *United States v. Scrivener*, 189 F.3d 944, 950 (9th Cir. 1999) ("It is beyond dispute that elderly victims are susceptible to telemarketing fraud."); *O'Neil*, 118 F.3d at 75 (upholding two level increase) (citing *United States v. Cron*, 71 F.3d 312, 314 (8th Cir. 1995); *United States v. Leonard*, 61 F.3d 1181, 1188 (5th Cir. 1995)); see *United States v. Anderson*, 349 F.3d 568, 572 (8th Cir. 2004) ("When a telemarketing scam is aimed at the elderly because they are believed to be lonely and susceptible, a § 3A1.1(b)(1) increase is obviously appropriate.").

56. *United States v. Sims*, 329 F.3d 937, 944 (7th Cir. 2003) ("Elderly victims satisfy the requirements of § 3A1.1(b)(1), especially when their financial investments and financial security are at issue.").

57. *Blake*, 81 F.3d at 504; see also *United States v. Billingsley*, 115 F.3d 458, 463 (7th Cir. 1997) ("[I]t is obvious that people of advanced years in general are less capable of resisting attack than are younger people.") (citation omitted); cf. *Anderson*, 349 F.3d at 572 ("When a vigorous young defendant inflicts a crime of violence on an elderly person, the defendant's knowledge that the victim was unusually vulnerable to this crime due to age is often obvious for purposes of clear error review.").

58. *United States v. Cogley*, 38 Fed. App. 231, 236 (6th Cir. 2002) ("One witness testified that [defendant] actually targeted nursing homes."); see *Sims*, 329 F.3d at 944 (some of the victims were residents of assisted living facilities).

59. U.S. SENTENCING GUIDELINES MANUAL § 5K2.0(a) (2003).

60. *Scrivener*, 189 F.3d at 951.

some circumstances, a court may apply both the vulnerable victim enhancement and depart upward when the elderly are targeted.⁶¹

In *United States v. Andrews*,⁶² the court departed upward and increased the defendant's sentence from fifteen to one hundred twenty months incarceration in a case that the judge characterized as a microcosm of modern society's elder abuse problem.⁶³ In *Andrews*, the defendant and his mother were convicted of conspiracy to defraud the United States, bank fraud, and access device fraud under circumstances involving identity theft from an elderly neighbor of the Andrews family.⁶⁴ The defendant's mother died before sentencing.⁶⁵

The court justified the upward departure by considering the advanced age of the victim, defendant's failure to make restitution and to fully accept responsibility for his misconduct, and his lack of remorse.⁶⁶ In an unusually scathing opinion, the court opined that the "egregious circumstances" of the case, in which the defendant had taken advantage of "an elderly lady, slight in stature" who had "survived the Great Depression, World War II, child birth and frugally saved," but who could not "survive the fiscal invasion and monetary assault upon her by her very own next door neighbors whom she trusted," compelled a greater sentence so as not to "make a laughing stock of the concept of justice."⁶⁷

B. State Criminal Law

In sharp contrast to the federal criminal system, state criminal codes are increasingly adding provisions directly criminalizing elder abuse and neglect,⁶⁸ a development that is not without controversy.⁶⁹

61. *Id.* at 951–52 (upholding the district court's upward departure to "take into consideration the unique evils inherent in telemarketing fraud upon the elderly").

62. *United States v. Andrews*, 301 F. Supp. 2d 607 (W.D. Tex. 2004).

63. *Id.* at 608 n.2 ("a frequent and sad commentary on modern society").

64. *Id.* at 608.

65. "Before this Court had an opportunity to sentence Georgene Andrews, she died and will therefore have to face whatever karmic or spiritual punishment awaits her. Perhaps Dante's Eighth Circle would be apropos." *Id.* at 609.

66. *Id.* at 608–12.

67. *Id.* at 607–08.

68. See, e.g., Maureen Weaver, *New Connecticut Criminal Law Targets Abuse of the Elderly, Blind, Disabled and Mentally Retarded*, MONDAQ BUS. BRIEFING, Mar. 5, 2004; cf. Tom Humphrey, *Bill Aims to Curb Abuse of Elderly; Measure to Strengthen Penalties for Physical, Financial Mistreatment*, KNOXVILLE NEWS-SENTINEL (Knoxville, Tenn.), Jan. 26, 2004, at A1 (proposed Elder Tennesseans Protection Act of 2004 includes provision to raise willful elder abuse or neglect from a misdemeanor

Some of these laws provide for significant punishments. For example, in *Mittendorf v. State*,⁷⁰ a Missouri defendant was sentenced to thirty years in prison after being convicted of “elder abuse in the first degree.”⁷¹

Many states still rely on generic criminal statutes to prosecute crimes against elderly nursing home residents, including such offenses as assault⁷² and sexual misconduct.⁷³ Even states with some form of elder abuse law frequently combine the two bases of liability in their prosecutorial efforts.⁷⁴

The effectiveness of state elder abuse criminal codes remains uncertain, particularly for physical abuse and neglect. For example, in 2003 a Missouri nursing home executive was convicted and incarcerated

to a felony). Virginia criminalizes abuse and neglect of “incapacitated” adults, who are defined to include a person who because of “advanced age or other causes . . . lacks sufficient understanding or capacity to make, communicate or carry out reasonable decisions concerning his well-being.” VA. CODE ANN. § 18.2-369 (Michie 2004).

69. See Larry King, *The Hard Case for Criminal Neglect: Shocking Pictures Led to a Tough Law*, PHILA. INQUIRER, Oct. 18, 2003, at A1 (Defense attorney argues that “caregivers who neglect patients belong in civil, not criminal, court.”); see also Marshall B. Kapp, *Legal Anxieties and End-of-Life in Nursing Homes*, 19 ISSUES L. & MED. 111, 115 (2003) (creation of heightened anxiety among care providers); *id.* at 127 (affecting decision whether to give narcotics to dying patients). A state criminal conviction against a nursing facility involving patient neglect or abuse serves as grounds for a mandatory five-year exclusion from all federal health care programs, including Medicare and Medicaid. 42 C.F.R. §§ 1001.101(b), 1001.102(a) (2005).

70. *Mitendorf v. State*, 7 S.W.3d 8 (Mo. Ct. App. 1999).

71. *Id.*; see Valerie Schremp, *Nursing Homes Chief Gets 1-Year Sentence; He Failed to Report Elderly Abuse*, ST. LOUIS POST-DISPATCH, Feb. 7, 2003, at A1 (nurse’s aide who beat elderly resident, who died a week later, sentenced to fifteen years incarceration for elderly abuse). The Missouri statute generally defines an elder as any person who is at least sixty years old. MO. ANN. STAT. § 565.180.1 (West 2003).

72. See, e.g., *State v. Kuhne*, No. E2000-02269-CCA-R3-CD, 2001 WL 1168196 (Tenn. Crim. App. Oct. 4, 2001) (defendant nursing home employee pled guilty to misdemeanor assault upon a seventy-nine-year-old patient suffering from Alzheimer’s, who was under defendant’s care).

73. See, e.g., *State v. Masuleh*, No. C9-98-887, 1999 WL 55496, at *1 (Minn. Ct. App. Feb. 9, 1999) (nursing home nurse’s assistant convicted of “attempted third-degree criminal sexual conduct” involving “a 71-year-old woman who suffered from Parkinson’s disease and dementia”).

74. See, e.g., King, *supra* note 69, at A1 (night attendant convicted under elder neglect statute, and convicted of third-degree murder and aggravated assault); Kay Lazar, *Cruel Care for Elderly: Cape Man Allegedly Tormented Patients*, BOSTON HERALD, Jan. 29, 2004 (nursing home employee charged “for allegedly kicking, punching and tormenting five frail Alzheimer’s patients in his care” with both assault and battery and patient abuse); *Man Gets 30 Years for Swindling the Elderly*, L.A. TIMES, Jan. 14, 2004, at B8 (“convicted of elder financial abuse, securities violations and grand theft”).

ated for failing to report the beating of an elderly resident.⁷⁵ Two other nursing home administrators were charged, but one was acquitted, and charges against the other were dropped in order to secure her testimony.⁷⁶ The sole conviction in that case resulted in the first known case in Missouri in which a nursing home executive had received a prison sentence in an elder abuse case, and only the second known case like this nationwide.⁷⁷

Eight years after Pennsylvania enacted a law criminalizing neglect of the elderly, prosecutors have used it "only sparingly,"⁷⁸ including limited use against nursing home facilities.⁷⁹ Court records indicated that less than 200 charges were filed statewide between 1996 and 2002, and from 1998 to 2000 prosecutors achieved only eighteen convictions.⁸⁰ In 2003, the State's Medicaid Fraud Control Section was averaging only five prosecutions annually.⁸¹ Similarly, only forty-three prosecutions were brought under Virginia's elder abuse statute during an eight-year period beginning in 1994.⁸²

A number of reasons have been offered to explain the low conviction rates for nursing home-based elder abuse. Most elder abuse occurs outside of nursing home settings.⁸³ Also, elder abuse is often costly to prosecute because such cases frequently require incurring the

75. Schremp, *supra* note 71, at A1. Evidence existed that a nursing home aide beat the elderly gentleman on two separate occasions. *Id.* After the second beating, the victim was hospitalized and died a week later. *Id.* The aide was convicted of elderly abuse and sentenced to fifteen years' incarceration. *Id.*

76. *Id.*

77. *Id.*

78. King, *supra* note 69, at A1.

79. Gary Rotstein & Cindi Lash, *Cases of Elder Neglect, Abuse Often Difficult to Prosecute*, PITTS. POST-GAZETTE, Oct. 26, 2003, at B1 ("[T]he neglect charge has been used seldom against facilities caring for Pennsylvania's old and vulnerable population.").

80. King, *supra* note 69, at A1.

81. *Id.*

82. David S. Fallis, *Virginia Rarely Prosecutes Cases of Neglect, Abuse*, WASH. POST, May 26, 2004, at A13 ("Just 43 times between 1994 and 2002 have people been prosecuted under a state law prohibiting abuse and neglect of the incapacitated or elderly, according to a review of computerized court records statewide.").

83. Rotstein & Lash, *supra* note 79, at 3 (A state prosecutor opined that "most elder abuse occurs in someone's home, rather than in an institution.") ("Of the nearly 1,500 reports of neglect and abuse investigated annually by protective service workers for the Allegheny County Area Agency on Aging, 18.5 percent involved nursing homes . . ."); Nat'l Ctr. on Elder Abuse, *Frequently Asked Questions: Who Are the Abusers of Older People?*, at <http://www.elderabusecenter.org/default.cfm?p=faqs.cfm> ("Family members are more often the abusers than any other group.").

cost of medical experts,⁸⁴ and investigating such crime taxes limited state resources.⁸⁵

The primary reason for relatively few convictions for elder abuse in a nursing home setting is that such misconduct is difficult to prosecute. First, elder abuse often goes unreported.⁸⁶ Many victims are simply incapable of reporting abuse.⁸⁷ Other victims and their families fail to report abuse because they are afraid of retribution.⁸⁸ Still others simply do not know to whom or where they should report.⁸⁹ Some nursing home employees are afraid that reporting elder abuse may result in job loss or allegations of similar misconduct being made against them.⁹⁰

Even when elder abuse is reported to proper authorities, many reports are untimely. In 2002, the General Accounting Office (GAO) reported that a review of state “physical and sexual abuse case files indicated that about 50 percent of the notifications from nursing homes were submitted 2 or more days after the nursing homes learned of the alleged abuse.”⁹¹ Moreover, law enforcement officials are frequently notified after other state agencies receive abuse reports, further lengthening the time before a criminal investigation is initiated.⁹² In many states, no requirement exists for nursing homes to report abuse to police officials.⁹³ The GAO posited that the tardy re-

84. King, *supra* note 69, at 3 (“Cost also can come into play. Neglect cases typically require expensive medical experts to testify about standards of care. . . . Last year, money was cited as a reason for not pursuing a case involving another . . . facility . . .”).

85. See LaPolt, *supra* note 19, at 12A (“overburdened, underpaid state workers”; noting that over nine years, reports of elder abuse doubled while staffing levels remained constant).

86. See GEN. ACCOUNTING OFFICE, *supra* note 9, at 8.

87. See *supra* text accompanying note 16; *infra* note 167; cf. *supra* text accompanying note 16 (elderly nursing home resident testimony limited by “an inability to communicate”).

88. GEN. ACCOUNTING OFFICE, *supra* note 9, at 4 (“Some residents or family members may be reluctant to report abuse for fear or retribution”). One law enforcement official told GAO that “family members are sometimes fearful that the resident will be asked to leave the home and are troubled by the prospect of finding a new place for the resident to live.” *Id.* at 9.

89. *Id.* at 4 (“Residents or family members . . . may be uncertain about where to report abuse.”).

90. *Id.* at 9.

91. *Id.* at 4.

92. *Id.* at 9.

93. *Id.* at 6–7. Federal law does not require such notification. *Id.*

ports “compromise[d] the quality of available evidence and hinder[ed] investigations.”⁹⁴

Additionally, many elder abuse victims make poor witnesses. Elderly victims may suffer from impaired or deteriorating memory,⁹⁵ other mental impairments,⁹⁶ or are unable to communicate.⁹⁷ Elderly nursing home residents oftentimes have difficulty remembering critical details about a crime if a lengthy time transpires between the incident and date of trial.⁹⁸ Furthermore, because many nursing home residents are of advanced age, a significant risk exists that they might not be alive at the time of trial.⁹⁹ In one study, eleven of twenty elderly nursing home victims of sexual abuse died within a year of the misconduct.¹⁰⁰

Finally, in some cases prosecutors must contend with jury appeal issues. For example, in homicide cases, “[j]uries may [be] hesitant to punish someone for premature death of a person already known to be in the last stages of life.”¹⁰¹

IV. Civil False Claims Act

A. General

The civil False Claims Act¹⁰² (FCA) was originally enacted during the Civil War in response to widespread fraud among defense contractors.¹⁰³ Since that time, the FCA has become the government’s

94. *Id.* at 4.

95. *Id.* at 5 (“Delays in investigations, as well as in trials, reduced the likelihood of successful prosecutions because the memory of witnesses often deteriorated.”).

96. *Id.* at 16 (“[R]esident testimony could be limited by mental impairments . . .”); see Fallis, *supra* note 82, at A13 (Former police detective opined “[T]he mental or physical disabilities of the victims can make them poor witnesses.”).

97. GEN. ACCOUNTING OFFICE, *supra* note 9, at 16.

98. *Id.* at 16–17.

99. *Id.* at 17.

100. *Id.* (citing Ann W. Burgess, et al., *Sexual Abuse of Nursing Home Residents*, 38 J. PSYCHSOCIAL NURSING 10 (2000)).

101. Rotstein & Lash, *supra* note 79, at 1.

102. 31 U.S.C. §§ 3729–3733 (2000).

103. FALSE CLAIMS AMENDMENTS ACT OF 1986, S. REP. NO. 99-345, at 8 (1986), reprinted in 1986 U.S.C.C.A.N 5266, 5273 (“The False Claims Act was adopted in 1863 and signed into law by President Abraham Lincoln in order to combat rampant fraud in Civil War defense contracts.”); see also Rainwater v. United States, 356 U.S. 590, 592 (1958) (“The Act was originally passed in 1863 after disclosure of widespread fraud against the Government during the War Between the States.”).

“weapon of first choice in combating fraud in virtually every program involving Federal funds,”¹⁰⁴ including health care fraud.¹⁰⁵ Indeed, the government’s largest FCA recoveries are currently in the area of health care fraud.¹⁰⁶ In June 2003, the Justice Department reported that it had achieved the largest combined criminal/FCA health care fraud settlement to date, with a total recovery of \$1.7 billion.¹⁰⁷

Generally, the FCA subjects to civil liability any person who knowingly presents, or causes to be presented, or conspires to present, a false or fraudulent claim upon the United States, or makes a false statement to get a claim paid.¹⁰⁸ The United States must only prove, by a preponderance of the evidence, that the defendant knowingly committed a violation of the Act.¹⁰⁹ The United States does not have to prove a specific intent to defraud, and “knowingly” is defined broadly to include: (1) actual knowledge of the information; (2) acts in deliberate ignorance of the truth or falsity of the information; or (3) acts in reckless disregard of the truth or falsity of the information.¹¹⁰ Private parties, known as *qui tam* relators or whistleblowers, are permitted to initiate FCA suits on behalf of the United States and share in any eventual recovery.¹¹¹ The consequences of suffering an adverse FCA judgment can be financially staggering.¹¹² The FCA provides for

104. JOHN T. BOESE, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS 1-3 (Supp. 1994) [hereinafter BOESE, CIVIL FALSE CLAIMS].

105. GEN. ACCOUNTING OFFICE, REPORT NO. GAO/HEHS-99-170, MEDICARE FRAUD AND ABUSE: DOJ’S IMPLEMENTATION OF FALSE CLAIMS ACT GUIDANCE IN NATIONAL INITIATIVES VARIES 16 (1999) (“One of DOJ’s most important weapons in the fight against health care fraud is the False Claims Act.”).

106. Press Release, Dep’t of Justice, Justice Dep’t Civil Fraud Recoveries Total \$2.1 Billion for FY 2003: False Claims Act Recoveries Exceed \$12 Billion Since 1986 (Nov. 10, 2003) (“As in the last several years, health care fraud accounted for the lion’s share of recoveries—\$1.7 billion.”); Jerry Seper, *Justice Recovers \$1 Billion in Frauds*, WASH. TIMES, Dec. 19, 2002, at A4 (“Health care fraud accounted for the majority of recoveries, totaling more than \$980 million.”); *see also* Mikes v. Strauss, 274 F.3d 687, 692 (2d Cir. 2001) (“As of February 2000, over half of the \$3.5 billion recovered since [the 1986] amendment derived from cases alleging fraud against the Department of Health and Human Services.”).

107. Press Release, Dep’t of Justice, Largest Health Care Fraud Case in U.S. History Settled HCA Investigation Nets Record Total of \$1.7 Billion (June 26, 2003) (settlement resolved criminal charges and nine FCA cases).

108. *See* 31 U.S.C. § 3729(a)(1)-(3) (2000); *accord* Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 769 (2000).

109. 31 U.S.C. §§ 3729(b), 3731(c).

110. *Id.* § 3729(b).

111. *Id.* § 3730(b), (d); *see also* Mikes, 274 F.3d at 692 (“whistle-blowers”).

112. GEN. ACCOUNTING OFFICE, *supra* note 105, at 5 (“In the health care setting, where providers submit thousands of claims each year, the potential damages and penalties provided under the False Claims Act can quickly add up.”).

a penalty of \$5,500 to \$11,000 per each false claim and further provides for treble damages.¹¹³

B. Application to the Nursing Home Industry

Although the FCA has existed since 1863, its application to the nursing home industry as a mechanism for addressing poor quality of care is relatively recent. Nursing homes are susceptible to FCA liability if they participate in Medicaid or Medicare.¹¹⁴ The FCA defines a claim to include “any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which it requested or demanded.”¹¹⁵ The FCA’s broad definition of a claim makes a nursing home that submits Medicare or Medicaid reimbursement claims subject to the Act.¹¹⁶

The amount of money involved for state and federal governments is significant. For 2002, the GAO estimated that “[c]ombined Medicare and Medicaid payments to nursing homes for care provided to vulnerable elderly and disabled beneficiaries were expected to total about \$63 billion . . . with a federal share of approximately \$42 billion.”¹¹⁷ Medicare pays for skilled-nursing facility care on a limited basis.¹¹⁸ In comparison, Medicaid pays for a much larger portion of

113. 31 U.S.C. § 3729(a); 28 C.F.R. § 85.3(a)(9) (2003) (adjusted for inflation).

114. *United States v. Bolden*, 325 F.3d 471 (4th Cir. 2003).

115. 31 U.S.C. § 3729.

116. *Hays v. Hoffman*, 325 F.3d 982, 988 (8th Cir. 2003) (The legislative history of the 1986 amendments to the FCA clarified “that false claims for FCA purposes include claims submitted to state agencies under the Medicaid program.”); *Mikes*, 274 F.3d at 695 (Medicare reimbursement claim is a claim for FCA purposes.); see *Horizon W., Inc. v. St. Paul Fire & Marine Ins. Co.*, 45 Fed. App. 752, 753 (9th Cir. 2002) (FCA suit filed against several nursing home operators alleging they “had submitted false Medicare and Medicaid claims, and had misrepresented the quality of care at its facilities to maintain eligibility for payment under Medicare and Medicaid.”); *United States ex rel. Eaton v. Kan. Healthcare Investors*, 22 F. Supp. 2d 1230, 1232 (D. Kan. 1998) (noting that FCA complaint alleged that licensed nursing home “was billing Medicaid for substandard care to its residents”).

117. GEN. ACCOUNTING OFFICE, *supra* note 8, at 6.

118. CTRS. FOR MEDICARE & MEDICAID SERVS., U.S. DEP’T OF HEALTH & HUMAN SERVS., PUB. NO. CMS-10153, MEDICARE COVERAGE OF SKILLED NURSING FACILITY CORE 11-16 (2003).

nursing home care.¹¹⁹ To illustrate, in Virginia, approximately seventy percent of nursing home residents rely on Medicaid, while only ten percent of Virginia nursing home residents were covered by Medicare.¹²⁰

Relatively recently, the Department of Justice (DOJ) began to use the FCA as a vehicle for addressing substandard care in nursing homes. The Government proceeds with such cases on one, two, or a combination of three theories of liability. First, the Government may proceed on a worthless services theory, that the nursing home's "billing is for nonexistent or grossly deficient goods and services."¹²¹ Second, the defendant's billing "is for services that violate core statutory, regulatory, or contractual requirements."¹²² Third, the defendant's claim "is based on false certifications."¹²³

One of the earliest uses of the FCA in an elder abuse type of case occurred in *United States v. CMS Management-Tucker, Inc.*¹²⁴ In March 1994, an elderly resident of a nursing home was transported to the hospital suffering from dehydration, malnutrition, anemia, gangrene, eye infections, and multiple pressure ulcers.¹²⁵ The individual had approximately twenty-six pressure ulcers (bedsores), with one on his shoulder joint measuring twelve-by-twelve centimeters and another on his hip described as being as large as a grapefruit.¹²⁶ The gangrene in his leg had progressed to the point that all five toes were falling off.¹²⁷

The man's condition was reported to various state agencies, eventually resulting in an inspection of the facility, which revealed additional deficiencies.¹²⁸ The U.S. Attorney's Office (USAO) for the Eastern District of Pennsylvania filed suit on the theory that the facility and its management company had engaged in a scheme to defraud

119. Sizemore, *supra* note 21.

120. *Id.*

121. Kristine Blackwood & Howard F. Daniels, *Nursing Home Liability for Failure of Care Under the False Claims Act*, 30 TAF Q. REV. 56, 57 (2003).

122. *Id.*

123. *Id.*

124. David R. Hoffman, *The Role of the Federal Government in Ensuring Quality of Care in Long-Term Facilities*, 6 ANNALS HEALTH L. 147, 148 (1997). David Hoffman was the Assistant United States Attorney who represented the United States in this case. *Id.*

125. *Id.* at 152-53.

126. *Id.* at 152.

127. *Id.*

128. *Id.* at 153.

the United States by billing and collecting, through Medicaid and Medicare, “for services rendered to residents of Tucker House Nursing Home when, in fact, the elderly residents did not receive the adequate care for which the United States was billed.”¹²⁹

The nursing home’s management was replaced, and the FCA case settled in an agreement by which the nursing home paid \$25,000 in penalties, and its management company paid an additional \$575,000.¹³⁰ Significantly, the settlement also included a corporate compliance program that required that Tucker House and eighteen associated facilities employ extensive state-of-the-art procedures to improve nutritional and wound care services.¹³¹ Approximately 4,000 nursing home residents directly benefited from the FCA compliance agreement.¹³²

To date, the USAO for the Eastern District of Pennsylvania has successfully resolved eleven FCA quality of care cases involving nursing homes.¹³³ Other offices within the DOJ, and *qui tam* relators acting on behalf of the United States,¹³⁴ pursued FCA cases against nursing homes on similar theories of liability.

In *United States v. NHC Health Care Corp.*,¹³⁵ the United States brought a FCA suit against a nursing home and skilled-nursing facility in Missouri on the theory that the facility “had such woefully low staff numbers . . . that it could not possibly have rendered all the care that it billed the Medicare and Medicaid programs.”¹³⁶ The United States posited that, because it knowingly provided inadequate staffing at the facility, the Defendant had made false and fraudulent claims upon the United States.¹³⁷ In support of its claims, the United States

129. *Id.* at 148.

130. *Id.* at 154.

131. *Id.*

132. *Id.*

133. News Release, United States Attorney’s Office, Eastern District Pennsylvania, U.S. Reaches Settlement with Bala Cynwyd Nursing Home (Aug. 28, 2003), *at* <http://www.usdoj.gov/usao/pae/Nursing/drexel.html>.

134. See, e.g., Susan Sward, *Clinton Calls for Reform of Nursing Home Industry*, S.F. CHRON., July 22, 1998, at A1 (After DOJ elected not to intervene, relators announced FCA lawsuit against nursing home chains for “collect[ing] millions of dollars in Medicare and Medi-Cal payments while provid[ing] substandard care.”). If the DOJ elects not to proceed with the FCA lawsuit, the relators “shall have the right to conduct the action.” 31 U.S.C. § 3730(c)(3) (2000).

135. *United States v. NHC Health Care Corp.*, 115 F. Supp. 2d 1149 (W.D. Mo. 2000).

136. *Id.* at 1151.

137. *Id.*

provided evidence concerning two residents who had developed bed-sores, lost an unusual amount of weight, suffered unnecessary pain, and eventually died as a result of substandard care.¹³⁸ In short, the United States “alleged that the Defendant has wholly failed to properly care for these two residents,”¹³⁹ and by failing to follow relevant standards of care the Defendant, in effect, had “billed the United States for care it did not actually perform.”¹⁴⁰

Responding to Defendant’s motion to dismiss for failure to state a claim upon which relief could be granted, the court first addressed the propriety of applying the FCA to the health care industry, eventually determining that such policy decisions were best left to the legislative and executive branches.¹⁴¹ The court recognized that “there may be broad negative implications for the health care industry by the continued prosecution of providers under the FCA,” but determined that “it is not the place of this Court to exempt an entire industry from FCA liability simply because it may be hurt by such suits.”¹⁴²

Next, the court examined the Government’s complaint in the context of the traditional elements of a FCA lawsuit, relying on “the plain meaning and logical interpretation of the FCA.”¹⁴³ The court considered the Government’s theory of liability, Medicaid/Medicare’s per diem payment method for paying care facilities, and the nursing home’s concomitant obligation “to ‘care for its residents in such a manner and in such an environment as will promote maintenance or enhancement of the quality of life.’”¹⁴⁴ The court then held that in order to prevail, the United States would be required to prove “that the patients were not provided the quality of care which promotes the maintenance and the enhancement of the quality of life.”¹⁴⁵ Recognizing that the standard was “amorphous,” and that the Government had a “very difficult burden of proof,” the court nonetheless determined that the United States had pled a sufficient cause of action to proceed with the FCA lawsuit.¹⁴⁶

138. *Id.*

139. *Id.* at 1155.

140. *Id.* at 1156.

141. *Id.* at 1152.

142. *Id.*

143. *Id.*

144. *Id.* at 1153.

145. *Id.*

146. *Id.* at 1153–54.

C. Conflict and Controversy

The use of the FCA as a governmental means of addressing egregious quality of care deficiencies in nursing homes remains controversial. Proponents of its use cite to the government's general obligation to protect some of our most vulnerable citizens, who reside in nursing homes.¹⁴⁷ Other proponents cast their support in terms of the FCA's core purpose, which is to serve "as a weapon to rectify the squandering of public funds by government contractors unjustly enriching themselves at public expense."¹⁴⁸ Under this rationale, the FCA may appropriately be used "to protect frail, elderly, and disabled nursing home residents" by "ensur[ing] that nursing home residents receive the care that Congress intended them to receive, and for which taxpayers are paying."¹⁴⁹

Opponents to the application of the FCA against nursing homes offer both practical and legal objections to its use. In response to a proposal for more aggressive use of Florida's FCA, nursing industry representatives complained that increased fear of lawsuits would detract "from patient care by forcing workers to spend more time documenting every action," making a difficult job even harder, driving good workers out of the nursing home business, and ultimately driving some nursing homes out of business.¹⁵⁰ Similar arguments have been made with regard to the application of the federal FCA to nursing homes.¹⁵¹

147. Hoffman, *supra* note 124, at 147 ("The protection of our older adults residing in nursing homes is one of the most important functions of government, whether federal, state, or local.").

148. Blackwood & Daniels, *supra* note 121, at 67.

149. *Id.*

150. Lindsay Peterson, *Nursing Home Investigation Uses Hired Gun*, TAMPA TRIB., Mar. 13, 1998, at 1, available at 1998 WL 2767945.

151. John T. Boese, *Can Substandard Medical Care Become Fraud? Understanding an Unfortunate Expansion of Liability Under the Civil False Claims Act*, 29 THE BRIEF 30, 31 (2000) [hereinafter Boese, *Substandard Medical Care*] (FCA liability "may inflict a death blow on already struggling health care institutions. . . . Resources that would otherwise be directed to patient care are sapped as providers are forced to deal with burdensome regulations and fend off qui tam suits that may be frivolous or involve de minimis regulatory violations."). A 2004 report funded by a long-term-care industry trade group indicated that lawsuits against nursing homes, based on "consumer protection laws designed to safeguard the elderly from sloppy and abusive care," have caused insurance rates to rise an average of fifty-one percent, causing "some nursing home companies to leave certain states." Andrea Petersen, *Nursing Homes Face Insurance Crunch*, WALL ST. J., June 3, 2004, at D1, D2.

Some opponents of the application of the FCA argue that such application “represent[s] a radical departure from the ‘normal’ FCA fraud case and an attempt to ‘federalize’ malpractice cases.”¹⁵² Also, arguments have been offered “that the health care industry is unique in that quality of services rendered turns on professional judgments that should not be second-guessed by federal courts in the context of FCA cases.”¹⁵³ Opponents also argue that the FCA was not intended to serve as a regulatory tool against nursing homes.¹⁵⁴

Indeed, some cases have embraced this criticism of the FCA’s use. In *United States ex rel. Swan v. Covenant Care, Inc.*,¹⁵⁵ the court granted the defendant’s motion to dismiss a FCA lawsuit in which the relator alleged that the skilled-nursing facilities “routinely falsified patient records in order to conceal staffing and funding shortages which resulted in inadequate patient care.”¹⁵⁶ Generally, the relator claimed that the nursing facilities “fail[ed] to meet the minimum statutory quality of care requirements for participation in federal Medicare and Medicaid programs.”¹⁵⁷ The court dismissed the case on jurisdictional grounds, but alternatively determined that summary judgment was appropriate because the relator’s “allegations of records falsification and inadequate care fail to support a cognizable theory of FCA liability.”¹⁵⁸

The court stated that “the FCA is not a vehicle for ensuring regulatory compliance,” and that FCA liability is premised on the submission of false claims, not “to underlying activity that allegedly violates federal law.”¹⁵⁹ The court rejected a worthless services theory of liability because the defendant’s billing practices did not rise to the level of “a true worthless services claim.”¹⁶⁰ The court noted the failure to al-

152. Blackwood & Daniels, *supra* note 121, at 57.

153. *Id.*

154. United States v. NHC Health Care Corp., 115 F. Supp. 2d 1149, 1152 (W.D. Mo. 2000) (“The health care industry has vigorously resisted this movement by the Justice Department on a variety of fronts, not the least of which is that the FCA was never intended to be a regulatory tool.”); see Boese, *Substandard Medical Care*, *supra* note 151, at 31 (criticizing the use of the FCA by *qui tam* relators “as a regulatory enforcement device”).

155. United States *ex rel.* Swan v. Covenant Care, Inc., 279 F. Supp. 2d 1212 (E.D. Cal. 2002).

156. *Id.* at 1214. The DOJ declined to intervene in the case. *Id.* at 1215.

157. *Id.* at 1215.

158. *Id.* at 1220. The court dismissed the case because relator was not an original source of the alleged fraud. *Id.* (citing 31 U.S.C. § 3730(a)(4)(A) (2000)).

159. *Id.* at 1220–21.

160. *Id.* at 1221.

lege that patient neglect was of such severity that the patients were effectively receiving no services or care at all.¹⁶¹ Additionally, the court rejected a false certification theory of liability because the relator failed to introduce evidence indicating that the defendant had “certified compliance with the applicable Medicare regulations as prerequisite to receiving federal payment,” which the court believed the law required.¹⁶² Finally, the court made the policy determination that permitting the *qui tam* suit to proceed in the face of other governmental administrative sanctions would impermissibly “supplant the regulatory discretion granted to the HHS.”¹⁶³

D. Use Of The FCA Is Appropriate for Quality of Care Cases

Although the FCA was originally enacted to combat defense contractors, the scope of the FCA’s application has expanded exponentially. The FCA is now applicable to almost any program directly or indirectly funded with federal monies.¹⁶⁴

Congressional intent, both historically and in modern terms, supports the application of the FCA to quality of care enforcement within nursing homes.¹⁶⁵ Historically, Congress intended that the FCA enjoy a broad application. In *United States v. Neifert-White*,¹⁶⁶ the U.S. Supreme Court opined that the congressional debates leading to the passage of the original FCA ‘suggest that the Act was intended to reach all types of fraud, without qualification, that might result in financial loss to the Government.’¹⁶⁷ Ultimately, the Court held that the FCA “reache[d] beyond ‘claims’ which might be legally enforced, to all fraudulent attempts to cause the Government to pay out sums of money.”¹⁶⁸ Similarly, in an earlier case, the Supreme Court stated “that the objective of Congress was broadly to protect the funds and property of the Government from fraudulent claims, regardless of the particular form, or function, of the government instrumentality upon

161. *Id.*

162. *Id.* Additionally, the court viewed the holding in *NHC Healthcare Corp.* as being “questionable.” *Id.*

163. *Id.* at 1222.

164. BOESE, CIVIL FALSE CLAIMS, *supra* note 104, at 1–3.

165. See generally S. REP. NO. 99-345, at 4 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5269.

166. *United States v. Neifert-White Co.*, 390 U.S. 228 (1968).

167. *Id.* at 232.

168. *Id.* at 233.

which such claims were made.”¹⁶⁹ In the last major amendments to the FCA, which occurred in 1986, Congress sought to broaden its application to make the FCA “a more effective weapon against Government fraud,” particularly in the defense procurement and health care areas.¹⁷⁰

The FCA also offers a number of practical advantages to preventing elder abuse and neglect. First, the Act’s *qui tam* provisions may serve as an effective tool to bring elder abuse and neglect to the attention of government authorities. The National Center on Elder Abuse posits that the large majority of abusive situations remain unreported,¹⁷¹ a position supported by both the Waxman Report and GAO investigations.¹⁷² Many residents are simply incapable of reporting misconduct because they are relatively isolated and suffer from various (or multiple) physical or cognitive disabilities.¹⁷³ Other residents and their families are either afraid to report abuse or do not know where to do so.¹⁷⁴ When nursing homes do report allegations of physical abuse to proper authorities, such reports are frequently untimely, hampering investigative efforts.¹⁷⁵ Unfortunately, even when aware of abuse allegations, some nursing homes fail to investigate and/or report the allegation to proper authorities.¹⁷⁶

The FCA’s *qui tam* provisions provide a financial incentive to nursing home staff members and administrators to document and report abuse and other quality of care deficiencies.¹⁷⁷ Relators may re-

169. Rainwater v. United States, 356 U.S. 590, 592 (1958).

170. S. REP. NO. 99-345, at 4; *see also* Mikes v. Straus, 274 F.3d 687, 692 (2d Cir. 2001) (“In 1986 the Act was substantially amended to combat fraud in the fields of defense and health care.”).

171. *How Many People Are Suffering from Elder Abuse?*, *supra* note 4 (In 1996 the National Elder Abuse Incidence Study “found that only 16 percent of abusive situations are referred for help—84 percent remain hidden”).

172. WAXMAN REPORT, *supra* note 10, at 8.

173. Cf. GEN. ACCOUNTING OFFICE, *supra* note 9, at 1 (noting that many nursing home residents are “highly vulnerable” because they “often have multiple physical and cognitive impairments”); Nat’l Ctr. on Elder Abuse, *Frequently Asked Questions: What Makes An Older Adult Vulnerable To Abuse?*, at <http://www.elderabusecenter.org/default.cfm?p=faqs.cfm> (“Social isolation and mental impairment . . . are two factors that may make an older person more vulnerable to abuse.”).

174. GEN. ACCOUNTING OFFICE, *supra* note 9, at 4 (“[S]ome residents or family members may be reluctant to report abuse for fear of retribution while others may be uncertain about where to report abuse.”).

175. *Id.*

176. *See, e.g.*, WAXMAN REPORT, *supra* note 10, at 12–13.

177. *See* Press Release, Dep’t of Justice, Tennessee-Based National Healthcare Corporation Settles Medicare Fraud Case for \$27 Million (Dec. 15, 2000) (“[F]ormer

ceive as much as thirty percent of the Government's recovery, in addition to an award of reasonable expenses, attorney's fees, and costs.¹⁷⁸ In the Fiscal Year 2003, *qui tam* relators from all types of cases received more than \$319 million in FCA recoveries.¹⁷⁹

In 2001, the Justice Department settled a FCA case for \$104.5 million against several nursing homes in Florida who allegedly submitted false claims to Medicaid and Medicare by double billing for respiratory therapy services.¹⁸⁰ The two *qui tam* relators who initiated the lawsuit, an assistant finance administrator and a quality review manager, and their attorney, split \$8,203,064.27 as their share of the recovery.¹⁸¹

Furthermore, the FCA provides some measure of protection to whistleblowers. The Act contains a whistleblower protection provision, which entitles a person subjected to an adverse employment action, initiated because the employee either brought or supported a FCA lawsuit, to be made whole.¹⁸²

Similarly, at least twelve states have enacted FCAs based on the federal version, which contain *qui tam* provisions.¹⁸³ Numerous other states are considering enacting similar legislation.¹⁸⁴ Depending upon the state, relators may recover as much as fifty percent of the government's recovery.¹⁸⁵ And, like the federal version, state FCAs have been used successfully against nursing homes.¹⁸⁶

nursing home administrator" who reported inflated cost reports received 20% of the FCA recovery.).

178. 31 U.S.C § 3730(d)(2) (2000).

179. Press Release, Dep't of Justice, Justice Dep't Civil Fraud Recoveries Total \$2.1 Billion for FY 2003: False Claims Act Recoveries Exceed \$12 Billion Since 1986 (Nov. 10, 2003).

180. Jeff Testerman, *Blowing Whistle on Bosses Brings Them Millions*, ST. PETERSBURG TIMES, Mar. 25, 2001, at 1A, available at 2001 WL 6969543.

181. *Id.*

182. 31 U.S.C. § 3730(h).

183. John T. Boese, *State False Claims Laws Pose New Challenge for Contractors*, 24 ANDREWS GOV'T CONT. LITIG. REP. 16 (2003) ("Earlier this year, Virginia became the twelfth state to enact a *qui tam* false claims law modeled on the Federal False Claims Act."). The additional states include "California, Florida, Illinois, Louisiana, Texas, Tennessee, Nevada, Hawaii, Delaware, Massachusetts, and the District of Columbia." *Id.*

184. *Id.*

185. *Id.*

186. See, e.g., Myers v. State, 866 So. 2d 103, 104 (Fla. Dist. Ct. App. 2004) (Florida False Claims Act lawsuit successfully resolved against several nursing homes for allegedly filing "false claims and reports submitted to the Medicaid program for nursing home services and for care to persons in certain nursing homes.").

Second, as the *GMS Management-Tucker, Inc.* case exemplifies, successful resolution of quality of care FCA lawsuits frequently includes provisions for correcting systemic problems that ultimately improve the quality of care for nursing home residents.¹⁸⁷ Settlement provisions in other cases included such items as funding for “federal monitors . . . to access the quality of care,” temporarily relinquishing managerial control of the home, and paying for facility improvements.¹⁸⁸ Because individual facilities that are the subject of a lawsuit are often part of a chain of facilities, compliance programs may be applicable to the entire chain of homes, thus improving care for a large number of residents.

Finally, when limited to egregious cases of substandard care, in which death or serious injury results, the FCA should provide a sound legal basis for suit, under the most exacting standard of review. Even in *Covenant Care*, the court appeared to concede the legitimacy of a worthless services theory of FCA liability when the “neglect of . . . patients was so severe that, for all practical purposes, the patients were receiving no room and board services or routine care at all.”¹⁸⁹ Fortunately, the Department of Justice has wisely elected to focus its efforts on these types of cases.¹⁹⁰

V. Conclusion

Elder abuse in the United States is widely believed to exist at near epidemic proportions and should serve as a source of national embarrassment. Unfortunately, the problem extends into our nursing homes and skilled-nursing facilities, many of which fail to meet federal standards or to satisfy minimally adequate staffing levels. Responding to a recent federal survey of nursing homes in Arkansas, in which ninety-five percent of the homes were cited for at least one violation “with the potential to cause more than minimal harm to its residents,” and in which ninety-two percent of the homes failed to satisfy

187. Hoffman, *supra* note 124, at 148.

188. Robert Pear, *Higher Standards Prompt Crackdown on Nursing Homes*, SAN DIEGO UNION-TRIB., Dec. 4, 2000, at A7.

189. United States *ex rel.* Swan v. Covenant Care, Inc., 279 F. Supp. 2d 1212, 1221 (E.D. Cal. 2002).

190. Boese, *Substandard Medical Care*, *supra* note 151, at 36 (“To date, the government seems to have concentrated its enforcement efforts on especially egregious quality of care violations . . .”).

minimum staffing levels, a newspaper editor characterized the issue as "shameful."¹⁹¹

This article has attempted to gauge the effectiveness of two potential tools in the government's effort to combat elder abuse in nursing homes: use of elder-specific criminal statutes and the civil False Claims Act. Criminal statutes specifically focusing on elder abuse call increased attention to this national problem and, if not applied overzealously, provide an appropriate, additional avenue for government redress against those who victimize vulnerable nursing home residents. Furthermore, enhanced sentencing provisions specifically addressing elderly victims provide courts with the option of increasing sentences where appropriate so that a defendant's sentence reflects the severity of the crime and provides a deterrent to committing such crimes. Otherwise, particularly egregious instances of elder abuse would be inadequately punished, resulting in a travesty of justice.¹⁹²

However, elder abuse-specific criminal statutes are no panacea for combating abuse of our nursing home residents, particularly physical abuse. Resource limitations, competing priorities, cost considerations, reporting shortcomings, and the difficulties inherent in prosecuting such cases have hampered the use of the criminal justice system as an effective means of curbing elder abuse.

In comparison, the False Claims Act retains great potential as an effective, and appropriate, vehicle for addressing substandard care of nursing home residents, particularly when the quality of care is so poor that some residents are receiving the functional equivalent of no meaningful care at all. Under such circumstances, courts should find that a cognizable FCA claim exists and that policy considerations weigh in favor of the Act's application.

The FCA also offers a number of practical advantages to curbing elder abuse in our nation's nursing homes. First, the potential for a lucrative recovery provides some incentive for nursing home staff to report substandard care, in addition to other forms of health care fraud. These *qui tam* relators fill an informational void that government authorities often cannot obtain from patients, family members,

191. Masterson, *supra* note 21, at 19.

192. See, e.g., United States v. Andrews, 301 F. Supp. 2d 607 (W.D. Tex. 2004) ("Because of the egregious circumstances present here, twenty-five-years' experience on the bench in assessing and reviewing punishment teaches that fifteen months in prison for this defendant would make a laughing stock of the concept of justice.").

nursing facilities, or governmental inspectors. Additionally, the threat of an FCA lawsuit provides a financial incentive for nursing homes to provide adequate care and not attempt to maximize profits by cutting services. Finally, when meritorious lawsuits are brought and successfully resolved by trial or settlement, the resolution process permits inclusion of compliance provisions that contain systemic improvements and monitoring designed to enhance resident quality of care.