

**YOU DON'T HAVE TO GO HOME BUT  
YOU CAN'T STAY HERE: THE CURRENT  
STATE OF FEDERAL NURSING HOME  
INVOLUNTARY DISCHARGE LAWS**

*William Pipal*

*Federal regulations prohibit the involuntary discharge of nursing home residents in all but six situations; yet, the unlawful practice is widespread among nursing homes. The motivation to expel poor elderly residents who have their bills paid by Medicare or Medicaid stems from the hope of admitting residents who can pay from their personal funds so that the nursing home will make more money. Unfortunately, this practice leaves society's poor elderly vulnerable to unlawful discharge, requiring misinformed elderly residents and their families to face the difficult task of finding a suitable alternative.*

*In this Note, Mr. Pipal seeks to address the troubling issue of involuntary discharge from nursing homes with a combination of reforms to prevent nursing homes from unlawfully evicting residents. The Note begins by outlining the issues in nursing home funding and regulation, as well as the current law governing the involuntary discharge of nursing home residents. Mr. Pipal then goes on to explain the financial*

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*incentives nursing homes receive from the unlawful practice and the impact it has on the elderly population. Finally, Mr. Pipal suggests a multifaceted response to the problem, including requiring information to be dispensed when the admission agreement is signed, as well as holding nursing home administrators personally liable through agency law.*

## I. Introduction

Nursing homes serve an essential function in the long-term care continuum by providing nursing care around the clock to elderly residents.<sup>1</sup> By entrusting nursing homes with its most vulnerable members, society relies on these institutions and the regulations that govern them to ensure that the elderly are treated with a reasonably adequate level of care. This trust, however, has been misplaced.

Hospital dumping,<sup>2</sup> improper eviction,<sup>3</sup> and wrongful discharge<sup>4</sup> are all variations of the same practice: the unlawful involuntary discharge of a nursing home resident.<sup>5</sup> In recent years, the number of formal complaints<sup>6</sup> and news stories detailing improper nursing home

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1. See LAWRENCE A. FROLIK, RESIDENCE OPTIONS FOR OLDER AND DISABLED CLIENTS 311–12 (2008).

2. Rebecca S. Rivas, *When a Nursing Home Won't Take a Patient Back from the Hospital*, ST. LOUIS AM., May 27, 2010, [http://www.stlamerican.com/news/local\\_news/article\\_c60cc853-0960-5c1d-a2f5-82fdc1012bd1.html](http://www.stlamerican.com/news/local_news/article_c60cc853-0960-5c1d-a2f5-82fdc1012bd1.html). In recent years, "hospital dumping" of nursing home residents has become more prevalent in the nursing home industry. *Id.* Hospital dumping describes a practice in which a nursing home takes a resident to a local hospital for treatment and then refuses to take the resident back after he or she is released. *Id.*

3. Theo Francis, *To Be Old, Frail and Evicted: Patients at Risk*, WALL ST. J., Aug. 7, 2008, <http://online.wsj.com/article/SB121806702698918693.html>.

4. John Suayan, *Malpractice Suit Claims Woman Should Not Have Been Discharged from Nursing Home*, SE. TEX. REC., Oct. 7, 2010, <http://www.setexasrecord.com/mobile/story.asp?c=230291>.

5. This Note's primary focus is on the unlawful involuntary discharge of nursing home residents. It is important to remember, however, that the unlawful transfer of a resident to another nursing facility is just as egregious. An unlawful transfer may negatively impact a resident because of transfer trauma. See generally Elias S. Cohen, *Legal Issues in "Transfer Trauma" and Their Impact*, 21 GERONTOLOGIST 520 (1981). Additionally, residents' families can be impacted by the decision for a nursing home to transfer a resident because the resident may be sent to a facility that is not convenient for the family to visit.

6. *Long-Term Care Ombudsman Program*, ADMIN. ON AGING (Nov. 21, 2011, 2:23 PM), [http://www.aoa.gov/aoaroot/AoA\\_Programs/Elder\\_Rights/Ombuds](http://www.aoa.gov/aoaroot/AoA_Programs/Elder_Rights/Ombuds)

discharge practices has grown.<sup>7</sup> Nursing homes across the country shirk their duties and fail to follow proper protocol in discharging residents.<sup>8</sup> This leaves elderly residents and their families with the difficult task of finding suitable alternative care.

Recent news stories highlight the growing national concern regarding the unlawful discharge of nursing home residents. Consider the story of Angelo Botelho.<sup>9</sup> One day before Thanksgiving 2009, Botelho was told that if he did not immediately remove his wife Yolanda from the Life Care Center of Kona she would be evicted and placed in the psychiatric ward of a nearby hospital.<sup>10</sup> Botelho took his wife home but felt that the nursing home acted improperly and filed a complaint with state regulators regarding Life Care's resident discharge procedures.<sup>11</sup>

Although some residents or their families will file a complaint in cases of unlawful eviction, experts agree that many more improper evictions of nursing home residents go unchallenged.<sup>12</sup> For example, in 2007, Rachel Geller checked her aunt into a nursing home in Massachusetts.<sup>13</sup> Twenty-four hours after her aunt's admission, Geller received a phone call saying her aunt suffered a seizure and was being rushed to the emergency room.<sup>14</sup> Following discharge from the hospital, the nursing home refused to readmit Geller's aunt, forcing her to stay in the hospital's psychiatric unit until Geller found a new nursing home.<sup>15</sup> Geller recalled that at the time these events transpired, she was unaware that her aunt's discharge by the nursing home violated federal law.<sup>16</sup>

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man/index.aspx. In 2008, the second most frequent nursing facility complaint was one alleging unlawful discharge of a resident by a nursing home. *Id.*

7. See, e.g., Francis, *supra* note 3 (noting formal complaints about nursing home discharge practices have doubled to 8,500 nationally, making it the second biggest category tracked by the Federal Administration on Aging).

8. *Id.*

9. Rob Perez, *Eviction Without Notice Not Allowed*, HONOLULU ADVERT., Mar. 30, 2010, <http://the.honoluluadvertiser.com/article/2010/Mar/30/ln/hawaii/3300301.html>.

10. *Id.*

11. *Id.*

12. Francis, *supra* note 3.

13. *Bill Aims to End Nursing Home 'Dumping,'* WCVBTV BOSTON (May 13, 2010), <http://www.thebostonchannel.com/health/23529953/detail.html>.

14. *Id.*

15. *Id.*

16. *Id.*

The cases of Botelho and Geller are not isolated. Although no definitive numbers exist as to the precise amount of elderly residents discharged against their will, stories from across the country detail the plight of nursing home residents and bring to light the harsh reality that residents and their families must endure.<sup>17</sup> Additionally, these types of cases will increase as the United States' elderly population<sup>18</sup> grows in size thanks to advances in medicine and long-term care.<sup>19</sup> Thus, the successful enforcement of nursing home regulations will become of paramount importance over the next several decades.

Although nursing home regulation has addressed, to a certain extent, the unlawful discharge of elderly residents, regulation has failed to provide an entirely viable solution to these concerns. This Note examines the need for additional solutions to ensure adherence and effective enforcement of these regulations. Part II of this Note explains why nursing homes will become of critical importance to the older population in the coming decades. Part II also describes sources of nursing home funding, nursing home regulation in the United States, and the current law governing the involuntary discharge of nursing home residents. Part III of this Note examines why nursing homes continue to disregard their duties and how nursing homes escape liability when unlawfully discharging residents. Part IV of this Note proposes potential solutions to this national problem that focus on preventing and precluding nursing homes from unlawfully evicting residents. Part V concludes that a combination of reforms will provide the best chance of preventing nursing homes from unlawfully evicting residents in the future.

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17. *E.g.*, Gordon Gibb, *Nursing Home Evictions Equated to Human Dumping*, LAWYERSANDSETTLEMENTS.COM (Aug. 11, 2008, 11:30 AM), <http://www.lawyersandsettlements.com/features/nursing-home-abuse/nursing-home-abuse-evictions-elder.html> (describing the story of an elderly resident with Alzheimer's disease who was evicted from his or her original nursing home, was transferred to another nursing home, and died shortly thereafter); Rivas, *supra* note 2 (discussing how nursing homes frequently engage in hospital dumping of residents); Suayan, *supra* note 4 (detailing the story of a nursing home resident suffering from dementia who was discharged without her permission to an alternative location and died shortly after arriving at the other facility).

18. The phrases "elderly population," "senior population," and "older population" are used interchangeably throughout this Note to refer to the U.S. population age sixty-five and older.

19. WAN HE ET AL., U.S. CENSUS BUREAU, 65+ IN THE UNITED STATES: 2005, at 1 (2005), available at <http://www.census.gov/prod/2006pubs/p23-209.pdf>.

## II. Background

Major concerns are raised as nursing homes continue to disregard federal regulations concerning the involuntary discharge of nursing home residents. These concerns will become critical as the senior population grows significantly with the first wave of baby boomers now reaching the age of retirement. Currently, the federal regulations provide a variety of safeguards to protect nursing home residents from unlawful involuntary discharge. Nonetheless, based on the influx of recent news reports, these safeguards fail to prevent nursing homes from unlawfully discharging residents.

This section provides information on the projected growth of the United States' senior population in the coming decades. Additionally, this section discusses how the projected growth of the older population and a heightened incidence of dementia in the elderly will result in an increased reliance on nursing homes to provide long-term care for this segment of the population. This section will also briefly discuss the history of nursing home regulation in the United States, as well as the current regulations that govern nursing home facilities. Finally, this section concludes with an in-depth look at the federal regulations governing the involuntary transfer and discharge of nursing home residents.

### A. The Growth of the Elderly Population in the Coming Decades

The elderly population in the United States has grown significantly over the past several decades.<sup>20</sup> In 1980, there were over twenty-five million United States residents age sixty-five or older.<sup>21</sup> This comprised 11.3% of the total United States population.<sup>22</sup> In 2009, the elderly population numbered 39.6 million.<sup>23</sup> This represented 12.9% of the United States population, or about one in every eight Americans.<sup>24</sup> Although this growth in the elderly population has been sub-

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20. *Projected Future Growth of the Older Population: By Age 1900–2050*, ADMIN. ON AGING (June 23, 2010, 3:27:55 PM), [http://www.aoa.gov/AoARoot/Aging\\_Statistics/future\\_growth/future\\_growth.aspx#age](http://www.aoa.gov/AoARoot/Aging_Statistics/future_growth/future_growth.aspx#age) (select "Persons 65 and older" to download Excel data file).

21. *Id.*

22. *Id.* (select "Older Population as a Percentage of the Total Population" to download Excel data file).

23. *Aging Statistics*, ADMIN. ON AGING (Sept. 1, 2011, 1:17:40 PM), [http://www.aoa.gov/AoARoot/Aging\\_Statistics/index.aspx](http://www.aoa.gov/AoARoot/Aging_Statistics/index.aspx).

24. See *Projected Future Growth of the Older Population*, *supra* note 20.

stantial over the past three decades, it pales in comparison to the estimated growth of the elderly population in the future.

Projections predict that by the year 2030, there will be 72.1 million elderly citizens, comprising 19.3% of the United States population.<sup>25</sup> This dramatic increase can be attributed to the aging of the baby boom generation and advances in medicine and long-term care.<sup>26</sup> The baby boom spanned from 1946 to 1964 and comprises the largest generation in U.S. history.<sup>27</sup> During this period over seventy-nine million children were born and the birth rate in the United States reached an all-time high that has not been matched since.<sup>28</sup> As the baby boom cohort reaches the age of sixty-five, there will be a dramatic increase in the older population.<sup>29</sup> Moreover, because of advances in medicine and long-term care, the life expectancy of the senior population will increase as well.<sup>30</sup> These two factors will combine such that the elderly population in the United States will reach unprecedented levels. Consequently, society will rely as never before on nursing homes and other long-term care facilities to meet the needs of elderly Americans.

#### B. The Projected Demand for Nursing Home Care

The increased longevity of aging baby boomers will expand the need for nursing home care over the next several decades.<sup>31</sup> Currently, the elderly population accounts for ninety percent of nursing home residents.<sup>32</sup> As a person's age rises, his or her chances of requiring nursing home care increase as well.<sup>33</sup> Thus, as the baby boom genera-

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25. *See id.*

26. WAN HE ET AL., *supra* note 19, at 1–7, 64–69.

27. *See id.* at 6. The baby boom era was a period with high fertility rates and the largest annual number of births in the twentieth century. *See id.* at 13.

28. *See Live Births, Birth Rates, and Fertility Rates by Race: United States, 1909–2003*, CENTER FOR DISEASE CONTROL & PREVENTION, [http://www.cdc.gov/nchs/data/statab/natfinal2003.annvol1\\_01.pdf](http://www.cdc.gov/nchs/data/statab/natfinal2003.annvol1_01.pdf) (last visited Feb. 6, 2012) (see page two for relevant data).

29. The first baby boomers turned sixty-five on January 1, 2011. *See* WAN HE ET AL., *supra* note 19, at 10.

30. *Id.* at 11, 66–69.

31. *Long-Term Care: Aging Baby Boom Generation Will Increase Demand and Burden on Federal and State Budgets: Hearing Before the S. Comm. on Aging*, 107th Cong. 9–10 (2002), available at <http://www.gao.gov/new.items/d02544t.pdf>.

32. ALZHEIMER'S ASS'N, 2010 ALZHEIMER'S DISEASE FACTS AND FIGURES 23 (2010), available at [http://www.alz.org/documents\\_custom/report\\_alzfactsfigures2010.pdf](http://www.alz.org/documents_custom/report_alzfactsfigures2010.pdf).

33. Korbin Liu & Kenneth G. Manton, *The Effect of Nursing Home Use on Medicaid Eligibility*, 29 GERONTOLOGIST 59, 61 (1989). As the elderly live longer, they are

tion gets older, the number of elderly individuals requiring nursing home care at some point in their lives will increase from current levels.<sup>34</sup> Additionally, the need for nursing home care will become even more significant as the growing elder population in America lives longer than past generations did.<sup>35</sup>

Recent estimates suggest that elderly citizens over age eighty-five—the portion of the population most at risk for needing long-term care—will grow by a significant margin over the next several decades.<sup>36</sup> By 2030, the eighty-five and older population is projected to reach nearly nine million.<sup>37</sup> By 2050, this number is expected to increase to over nineteen million.<sup>38</sup> Consequently, the number of people requiring nursing home care will increase.<sup>39</sup> One projection suggests that forty-three percent of the U.S. “population age [sixty-five or] older will use a nursing home at some point before they die.”<sup>40</sup> Based on these figures, nursing homes and other long-term care facilities will see an influx of residents in the coming decades. Yet, increased longevity and a growing senior population will not be the only sources contributing to the surge in nursing home residents.

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more susceptible to develop age-related disabilities that will require the need for long-term care. See Lawrence A. Frolik & Alison P. Barnes, *An Aging Population: A Challenge to the Law*, 42 HASTINGS L.J. 683, 694–96 (1991) (discussing physical effects of aging on the elderly).

34. See David C. Grabowski & Jonathan Gruber, *Moral Hazard in Nursing Home Use*, 26 J. HEALTH ECON. 560, 560 (2007); see also Michael D. Rosko et al., *Prospective Payment Based on Case Mix: Will It Work in Nursing Homes?*, 12 J. HEALTH POL. POL'Y & L. 683, 687 (noting that population factors influencing the demand for nursing home care in the United States include demographic composition reflecting increased longevity, greater urbanization and mobility, and the disintegration of the extended family).

35. As of 2008, more than 3.2 million Americans resided in nursing homes across the United States. CTRS. FOR MEDICARE & MEDICAID SERVS., NURSING HOME DATA COMPENDIUM 28 (7th ed. 2009).

36. ARI HOUSER ET AL., AARP, ACROSS THE STATES: PROFILES OF LONG-TERM CARE AND INDEPENDENT LIVING 6 (8th ed. 2009), available at [http://assets.aarp.org/rgcenter/il/d19105\\_2008\\_atl.pdf](http://assets.aarp.org/rgcenter/il/d19105_2008_atl.pdf); see *Projected Future Growth of the Older Population*, *supra* note 20.

37. See *Projected Future Growth of the Older Population*, *supra* note 20.

38. See *id.*

39. See *id.* But see FROLIK, *supra* note 1, at 311 (noting that the percentage of nursing home residents over the past twenty-five years has been declining); Haya El Nasser, *Fewer Seniors Live in Nursing Homes; Improved Health, More Options for Care Cited*, USA TODAY, Sept. 27, 2007, at 1A (discussing the decrease in the number of nursing home residents over the past several decades).

40. Grabowski & Gruber, *supra* note 34, at 560–61.

### C. The Prevalence of Dementia and Alzheimer's Disease in the Elderly Population

The number of Americans diagnosed with Alzheimer's disease or another form of dementia is increasing at a startling rate.<sup>41</sup> Currently, 5.1 million people age sixty-five or older have Alzheimer's disease.<sup>42</sup> As people age, the incidence and prevalence of Alzheimer's disease and other forms of dementia also increase.<sup>43</sup> Therefore, the number of people suffering from some form of dementia will rise rapidly as the older population continues to grow and live longer. Indeed, by 2030, the number of people age sixty-five or older with Alzheimer's disease is projected to reach 7.7 million.<sup>44</sup>

The significant number of elderly citizens suffering from some form of dementia will have a major effect on the nursing home industry. Dementia is the most common diagnosis among nursing home residents.<sup>45</sup> A December 2010 survey conducted by the American Health Care Association reported that 47.38% of nursing home residents had a diagnosis of Alzheimer's disease or other dementia.<sup>46</sup> The growing elderly population and increased incidence of dementia will necessitate the effective enforcement of federal regulations to protect nursing home residents, as well as funding for this long-term care.

### D. Sources of Funding for Nursing Home Care

Long-term care for a nursing home resident can be extremely expensive. According to a recent survey, the average cost of a private

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41. ALZHEIMER'S ASS'N, *supra* note 32, at 10. Dementia is a clinical syndrome causing loss or decline in memory, coupled with the loss of one or more cognitive abilities. *Id.* at 5. Loss of cognitive ability varies among individuals but can include an inability to generate coherent speech, understand spoken or written language, identify objects, think abstractly, make sound judgments, or execute motor activities. *Id.* Several different types of dementia each have distinguishing brain abnormalities. *Id.* at 5-6. Alzheimer's disease, which accounts for sixty to eighty percent of dementia cases, is the most common. *Id.* at 5.

42. *Id.* at 10.

43. *Id.* at 7.

44. *Id.* at 14.

45. Andrea Gruneir et al., *Is Dementia Special Care Really Special? A New Look at an Old Question*, 56 J. AM. GERIATRICS SOC'Y 199, 199 (2008).

46. AM. HEALTH CARE ASS'N, LTC STATS: NURSING FACILITY PATIENT CHARACTERISTICS REPORT 14 (2010), available at [http://www.ahcancal.org/research\\_data/oscar\\_data/NursingFacilityPatientCharacteristics/PatientCharacteristicsReport\\_Dec2010.pdf](http://www.ahcancal.org/research_data/oscar_data/NursingFacilityPatientCharacteristics/PatientCharacteristicsReport_Dec2010.pdf).



room in a nursing home is almost \$71,000 per year,<sup>47</sup> and in some parts of the United States it can be even higher.<sup>48</sup> Therefore, many individuals seeking to place an elderly citizen into a nursing home require multiple sources of funding. The three most common sources of funding are personal resources, Medicare, and Medicaid.<sup>49</sup>

#### 1. PERSONAL RESOURCES

Nearly half of all nursing home residents pay nursing home costs out of their own savings at some point during their nursing home stay.<sup>50</sup> After these savings and other resources are spent, many people who stay in nursing homes for long periods eventually become eligible for Medicaid.<sup>51</sup> Nursing homes prefer private pay residents because the facility can charge these residents more than it receives for residents sponsored by Medicare or Medicaid.<sup>52</sup>

#### 2. MEDICARE AND MEDICAID

In 1965, Congress established the Medicare and Medicaid programs.<sup>53</sup> Both programs help elderly residents pay for nursing home coverage, albeit for different levels of care.<sup>54</sup> Medicare's coverage for nursing home care is limited to reimbursing for care provided in a "skilled nursing facility."<sup>55</sup> Conversely, Medicaid covers nursing

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47. GENWORTH FINANCIAL, 2006 COST OF CARE SURVEY: NURSING HOMES, ASSISTED LIVING FACILITIES AND HOME CARE PROVIDERS 2 (2006), available at [https://longtermcare.genworth.com/comweb/pdfs/long\\_term\\_care/Cost\\_Of\\_Care\\_Survey.pdf](https://longtermcare.genworth.com/comweb/pdfs/long_term_care/Cost_Of_Care_Survey.pdf).

48. *Id.* at 6–7. For example, in Alaska the average annual rate for a private room is over \$190,000. *Id.* at 6.

49. HARRIET L. KOMISAR & LEE SHIREY THOMPSON, GEORGETOWN UNIV., LONG-TERM CARE FINANCING PROJECT: NATIONAL SPENDING FOR LONG-TERM CARE FACT SHEET 1 (2007), available at <http://ltc.georgetown.edu/pdfs/natspending2007.pdf>. National spending on long-term care in 2007 was \$194.2 billion. *Id.*

50. FROLIK, *supra* note 1, at 313.

51. *See id.*

52. *Access to Care and Investor-Owned Providers*, in FOR-PROFIT ENTERPRISE IN HEALTH CARE 97, 110 (Bradford H. Gray ed., 1986).

53. 42 U.S.C. §§ 1395c, 1396 (2006) (Medicare and Medicaid). *See generally* LAWRENCE A. FROLIK & RICHARD L. KAPLAN, ELDER LAW IN A NUTSHELL 56–138 (5th ed. 2010) (discussing Medicare and Medicaid's history, benefits, and eligibility requirements).

54. FROLIK & KAPLAN, *supra* note 53, at 161.

55. 42 U.S.C. § 1395i-3(a) (defining a skilled nursing facility as an institution that is primarily engaged in providing skilled nursing care and rehabilitation services for injured, sick, or disabled persons, not one that primarily provides for the care and treatment of people with diseases). Moreover, there are four precondi-

home care much more extensively.<sup>56</sup> Indeed, Medicaid accounts for nearly half of the national spending for long-term care.<sup>57</sup> Today, many elderly Americans rely on Medicaid and Medicare to assist in paying for the high costs associated with nursing home care.<sup>58</sup> Yet, the establishment of Medicare and Medicaid did more than help people pay for nursing home care. It also marked a significant increase in the number of nursing homes in the United States.<sup>59</sup>

#### E. Nursing Homes in the United States

The enactment of Medicare and Medicaid prompted the growth of the nursing home industry in the United States.<sup>60</sup> After the enactment of the Medicare and Medicaid programs in 1965, the number of nursing homes grew by 140%, the number of nursing home beds increased by 302%, and the amount of revenue received by the nursing home industry rose 2000%.<sup>61</sup> Regrettably, the expansion of the nursing home industry coincided with the prevalence of substandard conditions in nursing homes.<sup>62</sup> To counteract this problem, the government made initial attempts to regulate nursing home care.<sup>63</sup> These attempts at regulation failed to alleviate the deplorable conditions, however, and the nursing home industry's troubles remained unaddressed until the 1980s.<sup>64</sup>

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tions for Medicare coverage as well as a 100-day limitation on the duration of the nursing home stay. See generally Richard L. Kaplan, *Retirement Planning's Greatest Gap: Funding Long-Term Care*, 11 LEWIS & CLARK L. REV. 407, 418–20 (2007) (discussing the four preconditions and the length of stay limitation).

56. KOMISAR & THOMPSON, *supra* note 49, at 1–2.

57. *Id.* at 1. Medicare accounts for nineteen percent. *Id.*

58. FROLIK & KAPLAN, *supra* note 53, at 166.

59. *The History of Nursing Homes*, FATE: FOUNDATION AIDING THE ELDERLY, <http://www.4fate.org/history.html> (last visited Feb. 5, 2012).

60. COMM. ON NURSING HOME REGULATION, INST. OF MED., *IMPROVING THE QUALITY OF CARE IN NURSING HOMES* 241 (1986). Before the enactment of Medicare and Medicaid, the federal government established programs for licensing nursing homes but failed to dictate any standards or enforcement procedures. *Id.* at 239.

61. *The History of Nursing Homes*, *supra* note 59. This growth was primarily in private industry. *Id.*

62. COMM. ON NURSING HOME REGULATION, *supra* note 60, at 241–43.

63. *Id.*

64. See generally *id.* at 241–49 (providing a brief history of federal nursing home regulation in the United States).

### 1. MEDICARE, MEDICAID, AND THE BEGINNING OF FEDERAL REGULATION OF THE NURSING HOME INDUSTRY

The enactment of the Medicare and Medicaid programs marked the first time that the federal government set health and safety standards for nursing homes.<sup>65</sup> Nursing homes electing to receive government funding had to abide by regulations promulgated by the Department of Health, Education, and Welfare (HEW).<sup>66</sup> In 1967, Congress amended the Medicaid program, authorizing HEW to develop standards and regulations to be applied uniformly across the states.<sup>67</sup> Even with these regulations, scandal continued to plague the nursing home industry throughout the 1970s.<sup>68</sup>

Substandard care in nursing home facilities led to a call for extensive reform of the nursing home industry at the federal level. According to investigations in the early 1970s, many nursing homes provided substandard care for their elderly residents.<sup>69</sup> The perceived lack of care for nursing home residents resulted in a number of critics labeling nursing homes as “warehouses” for the old and “junkyards” for the dying.<sup>70</sup> Congressman David Pryor referred to nursing homes as halfway houses between society and the cemetery.<sup>71</sup> Clearly, changes were needed to improve the level of care provided to nursing home residents.

Overhaul of the nursing home regulatory scheme finally occurred in the 1980s.<sup>72</sup> In 1985, a report by the Institute of Medicine gave Congress the motivation it needed to change the regulatory policies and procedures in nursing homes to assure that nursing home

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65. *See id.* at 241–42.

66. *Id.* at 241. HEW is now referred to as the Department of Health and Human Services.

67. *Id.* at 242. These amendments included specified standards for nursing homes and also provided HEW authority to withhold federal funds from nursing homes not meeting these standards. *Id.*

68. *Id.* at 242–43; Clifford E. Cardone, *Battling Nursing Home Neglect: Finding the Right Legal Pieces*, 44 LA. B.J. 508, 509 (1997); PUBLIC BROADCASTING STATION (PBS), *Today's Nursing Homes: The Evolution of Nursing Home Care in the United States*, <http://www.pbs.org/newshour/health/nursinghomes/timeline.html> (last visited Feb. 5, 2012).

69. COMM. ON NURSING HOME REGULATION, *supra* note 60, at 242. In the early 1970s, the lack of health and safety standards for nursing homes became front page news when a fire killed thirty-two residents in Ohio and an outbreak of food poisoning in Maryland killed thirty-six residents. *Id.*

70. ROBERT N. BUTLER, *WHY SURVIVE?: BEING OLD IN AMERICA* 260 (1975).

71. David H. Pryor, *Somewhere Between Society and the Cemetery: Where We Put the Aged*, THE NEW REPUBLIC, Apr. 25, 1970, at 15.

72. FROLIK, *supra* note 1, at 348.

residents received satisfactory care.<sup>73</sup> The Institute of Medicine report sought to identify the best ways to address the substandard care plaguing the nursing home industry.<sup>74</sup> Ultimately, the report concluded that more effective federal regulation could improve the quality of nursing home care.<sup>75</sup> This eventually led to the passage of the Nursing Home Reform Act (NHRA), which resulted in the biggest overhaul of federal nursing home regulations in U.S. history.<sup>76</sup>

## 2. THE NURSING HOME REFORM ACT

The Nursing Home Reform Act is the single most important piece of legislation aimed at ensuring adequate quality of life for nursing home residents in the United States.<sup>77</sup> The NHRA represented a radical change in nursing home laws by mandating quality of life standards<sup>78</sup> and providing a “Residents’ Bill of Rights.”<sup>79</sup> The main goal of the NHRA is to ensure that nursing home residents receive quality care that will allow them to achieve or “maintain [the] highest practicable physical, mental, and psychosocial well-being.”<sup>80</sup> To advance this goal, nursing home residents are provided with an extensive list of rights that the nursing home facility must “protect and promote.”<sup>81</sup> With the promotion of these rights in mind, federal law seeks to regulate the nursing home industry.

### F. Regulations Imposed on Nursing Homes in the United States

The federal government imposes regulations on nursing homes, along with mandating that states regulate certain aspects of the nurs-

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73. See generally COMM. ON NURSING HOME REGULATION, *supra* note 60.

74. *Id.*

75. See generally *id.* at 21–44 (discussing the conclusions and recommendations of the committee’s report).

76. FROLIK, *supra* note 1, at 348.

77. FROLIK & KAPLAN, *supra* note 53, at 168.

78. 42 U.S.C. § 1396r(b)(1)(A) (2006); 42 C.F.R. § 483.15 (2009).

79. 42 U.S.C. § 1396r(c); 42 C.F.R. § 483.10.

80. 42 C.F.R. § 483.25; HOLLIS TURNHAM, THE NAT’L LONG-TERM CARE OMBUDSMAN RESOURCE CTR., FEDERAL NURSING HOME REFORM ACT FROM THE OMNIBUS BUDGET RECONCILIATION ACT OF 1987, *available at* <http://www.allhealth.org/briefingmaterials/obra87summary-984.pdf> (last visited Mar. 13, 2012).

81. 42 C.F.R. § 483.10. The resident can exercise his or her rights as a resident of the facility and the right to be free of “interference, coercion, discrimination, and reprisal” from the nursing home facility for exercising his or her rights. *Id.* § 483.10(a)(1)–(2).

ing home industry.<sup>82</sup> At a minimum, a nursing home must provide high-quality care to its residents consistent with the federal regulations.<sup>83</sup> These regulations apply to every nursing home certified to accept payment from Medicare or Medicaid.<sup>84</sup> Because over ninety-seven percent of nursing homes have certification for Medicare, Medicaid, or both, these regulations almost always apply.<sup>85</sup>

#### 1. NURSING HOME DEFINED

The statutory definition of a nursing home determines whether federal regulations cover a long-term care facility. A “nursing home” has a specific definition under federal law that distinguishes it from other types of long-term care facilities. A nursing home in general parlance can mean any number of facilities providing assistance for those in need of specialized care.<sup>86</sup> Federal law, however, defines a nursing home as an institution primarily engaged in providing skilled nursing care or rehabilitation services for injured, disabled, or sick persons.<sup>87</sup> Like other forms of long-term care, nursing homes provide custodial care for elderly residents.<sup>88</sup> It is the level of medical care that nursing homes offer residents, however, that separates them from other forms of long-term care.

#### 2. FAILURE TO COMPLY WITH FEDERAL REGULATIONS

Dramatic repercussions may arise for a nursing home facility that fails to meet the requirements dictated under the federal regulations. For example, nursing homes can be barred from receiving Medicaid or Medicare reimbursement for their residents if they fail to comply with federal regulations.<sup>89</sup> Because nursing homes receive more than sixty percent of their income from Medicaid and Medicare,

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82. FROLIK & KAPLAN, *supra* note 53, at 167.

83. *Id.* at 167–68.

84. *Id.*

85. ERIC CARLSON, NAT’L SENIOR CITIZENS LAW CTR., THINK TWICE BEFORE SIGNING: IMPROPER AND UNFAIR PROVISIONS IN MISSOURI NURSING HOME ADMISSION AGREEMENTS 1 (2007) (on file with author). Because these laws apply to every nursing home that is certified to accept payment from Medicare or Medicaid programs, even if the resident involved is not eligible for either program, he or she is protected. *Id.*

86. FROLIK, *supra* note 1, at 311.

87. 42 U.S.C. §§ 1395i-3(a)(1)(A)–(B), 1396d(f) (2006); FROLIK, *supra* note 1, at 311.

88. FROLIK, *supra* note 1, at 311.

89. FROLIK & KAPLAN, *supra* note 53, at 167.

the loss of federal funding can have significant financial consequences.<sup>90</sup> For instance, the loss of federal funding can result in a nursing home being forced to go out of business.<sup>91</sup> Thus, compliance with federal law should be of serious concern to nursing homes wishing to stay financially viable. Yet, as seen by the string of recent news reports, many nursing homes consciously disregard state and federal regulations by unlawfully discharging nursing home residents.<sup>92</sup>

### G. The Law Governing the Involuntary Discharge of Nursing Home Residents

The federal regulations define a discharge of a nursing home resident to include the “movement of a resident to a bed outside of the certified facility whether that bed is in the same physical plant or not.”<sup>93</sup> The federal regulations promulgate a set of standards that nursing homes must follow when involuntarily discharging a resident from their facilities.<sup>94</sup> Notably, the federal regulations dictate six permissible reasons for the discharge of a resident.<sup>95</sup> These six reasons are the only acceptable motives for involuntary discharge and serve to protect residents from being subject to eviction based on the whims of a nursing home facility.

#### 1. THE SIX PERMISSIBLE REASONS FOR THE INVOLUNTARY DISCHARGE OF A NURSING HOME RESIDENT

Federal law narrowly restricts the bases upon which a nursing home facility may discharge a nursing home resident against his or her will.<sup>96</sup> The federal regulations only allow a nursing home to dis-

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90. JOHN BRAITHWAITE ET AL., *REGULATING AGED CARE: RITUALISM AND THE NEW PYRAMID* 17 (2007).

91. FROLIK & KAPLAN, *supra* note 53, at 167–68; *see, e.g.*, Gary Marx & David Jackson, *Troubled Nursing Home is Losing Federal Money*, CHI. TRIB., Feb. 7, 2010, §1, at 9; Stanley Ziemba, *Nursing Home Must Close After Losing Federal Funds*, CHI. TRIB., May 29, 2005, § 2 at 3.

92. *See supra* notes 2–4, 9, 13.

93. 42 C.F.R. § 483.12(a)(1) (2010). “Discharge” is defined as the moving of the resident to a non-institutional setting. JAMES E. ALLEN, *NURSING HOME FEDERAL REQUIREMENTS: GUIDELINES TO SURVEYORS AND SURVEY PROTOCOLS* 41 (5th ed. 2003).

94. 42 C.F.R. § 483.12.

95. *Id.* § 483.12(a)(2)(i)–(vi).

96. 42 U.S.C. §§ 1395i-3(c)(2), 1396r(c)(2) (2006); *Nichols v. St. Luke Ctr. of Hyde Park*, 800 F. Supp. 1564, 1567 (S.D. Ohio 1992); 42 C.F.R. § 483.12. Additionally, some states regulate the transfer or discharge of nursing home residents. *E.g.*,

charge a resident for one of the following reasons: (1) the nursing home is unable to meet the resident's needs, and as a result the resident's welfare requires the resident to be discharged from the facility; (2) the health of the resident has improved enough so that he or she no longer needs the services provided by a nursing home; (3) the resident's presence in the nursing home endangers the safety of other individuals in the nursing home; (4) "the health of individuals in the facility would otherwise be endangered" by the resident's presence; (5) "the resident, [or Medicare or Medicaid], has failed, after reasonable and appropriate notice, to pay . . . for a stay at the facility; or (6) "the facility ceases to operate."<sup>97</sup> A nursing home is not permitted to involuntarily discharge a resident for any other reasons besides the six listed above.<sup>98</sup> Therefore, any other reason for discharge advanced by a nursing home is improper and in violation of federal law. Aside from mandating the permissible reasons for involuntary discharge, the federal regulations also stipulate additional procedures nursing homes must follow when discharging a resident.<sup>99</sup>

## 2. PROPER DOCUMENTATION, ADVANCE NOTICE, AND OTHER STATUTORY REQUIREMENTS

Nursing homes must comply with a number of procedural requirements to legally discharge a nursing home resident. Whenever a nursing home wishes to involuntarily discharge a resident, it must document the reason for discharge and notify the resident and a family member or legal representative, if known.<sup>100</sup> The notice must be in

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6 COLO CODE REGS. § 1011-1, Ch.5, 12.6.2 (LexisNexis 2011); 210 ILL. COMP. STAT. 45/3-401 (2011); 900 KY. ADMIN. REGS. 2:050 (2011).

97. 42 U.S.C. § 1396r(c)(2)(A)(i)-(vi); 42 C.F.R. § 483.12(a)(2)(i)-(vi); ERIC M. CARLSON & KATHARINE BAU HSIAO, NAT'L SENIOR CITIZENS LAW CTR., THE BABY BOOMER'S GUIDE TO NURSING HOME CARE 146 (2006). The federal Medicare statute mirrors the Medicaid requirements. 42 U.S.C. § 1395i-3(c)(2)(A)(i)-(vi).

98. See 42 C.F.R. § 483.12. There are a number of specific requirements that nursing homes must meet when discharging a resident for several of the reasons listed in the text accompanying note 97. For instance, in each of the first five situations, the basis for the discharge must be documented in the resident's medical record. *Id.* § 483.12(a)(3). For the first two situations, the resident's own personal physician must make that documentation. 42 U.S.C. § 1396r(c)(2)(A); 42 C.F.R. § 483.12(a)(3)(i). In the fourth situation—where the health of others in the facility is endangered—a physician other than the resident's physician may document the reason for the discharge. 42 U.S.C. § 1396r(c)(2)(A); 42 C.F.R. § 483.12(a)(3)(ii).

99. 42 C.F.R. §§ 483.12(a)(4)(i), (5)(A)-(D).

100. 42 U.S.C. § 1396r(c)(2)(B)(i)(I); 42 C.F.R. § 483.12(a)(3). The procedural requirements that nursing homes must follow seem to be related to the resident's right to appeal the involuntary discharge decision. For a discussion of a nursing

writing and in a language and manner that the resident will understand.<sup>101</sup>

In addition to the need for proper documentation of the reason for discharge, there are also advance notice requirements that nursing home facilities must follow to lawfully discharge a resident. A nursing home must provide a resident with at least thirty days' advance notice of involuntary discharge.<sup>102</sup> Limited exceptions apply in the case of a medical emergency or when the presence of the resident endangers the health, welfare, or safety of other residents in the nursing home facility.<sup>103</sup> A facility may also transfer or discharge a resident without the normally required thirty days' notice if the resident's health improves sufficiently to allow such a transfer or discharge,<sup>104</sup> or if the resident has resided in the facility for fewer than thirty days.<sup>105</sup> Even in these cases, however, notice must be given as many days before the date of the proposed discharge as possible.<sup>106</sup>

Nursing homes must also ensure that the resident's discharge from the facility is as peaceful as possible. To comply with federal regulations, nursing homes must attempt to alleviate the stress of relocation on an elderly resident through the use of discharge planning.<sup>107</sup> Nursing homes must ensure that the discharge is orderly and that the resident is prepared for, and oriented to, his or her new surroundings.<sup>108</sup> Adherence to these requirements is important due to

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home resident's right to appeal under federal law, please see Kathleen Knepper, *Involuntary Transfers and Discharges of Nursing Home Residents Under Federal and State Law*, 17 J. L. MED. 215, 222-24 (1996).

101. 42 C.F.R. § 483.12(a)(4)(i). Federal regulations also mandate that the discharge or transfer notice include the reason for transfer or discharge, the effective date of the transfer or discharge, the location to which the resident is to be transferred or discharged, a statement noting the resident's right to appeal, and the telephone number of the state long-term care ombudsman. *Id.* § 483.12(a)(6)(i)-(v).

102. *Id.* § 483.12(a)(5)(i). This notice may be to the resident or the resident's legal guardian as specified. *Id.*

103. *Id.* § 483.12(a)(5)(ii)(A)-(D).

104. *Id.* § 483.12(a)(5)(ii)(C).

105. *Id.* § 483.12(a)(5)(ii)(E). These exceptions appear to consume the rule and make the thirty day advance notice requirement an afterthought. *See, e.g.,* Nichols v. St. Luke Ctr. of Hyde Park, 800 F. Supp. 1564, 1570 (S.D. Ohio 1992) (stating the facility had given notice that was practicable and was not required to provide notice thirty days in advance of relocating a resident).

106. 42 U.S.C. § 1395i-3(b)(2)(B)(ii) (2006); 42 C.F.R. § 483.12(a)(5).

107. 42 C.F.R. § 483.12(a)(7).

108. 42 U.S.C. § 1396r(c)(2)(C); 42 C.F.R. § 483.12(a)(7). In addition, some state laws may be more specific about the facility's duties regarding transfer planning. *See infra* notes 114-17.



the risk of transfer trauma when a nursing home involuntarily transfers or discharges a resident.<sup>109</sup> Transfer trauma is a phenomenon associated with the involuntary relocation of the elderly.<sup>110</sup> In extreme cases, the relocation can cause excessive stress on the resident resulting in physical and psychological damage, increased morbidity, and even death.<sup>111</sup> The federal requirements discussed above are the minimum baseline requirements for state regulation of nursing homes. States, of course, may impose more stringent requirements on nursing homes, and indeed some have.<sup>112</sup>

### 3. STATES IMPOSING MORE STRINGENT REQUIREMENTS ON NURSING HOMES SEEKING TO INVOLUNTARILY DISCHARGE RESIDENTS

The federal regulations governing involuntary discharge of nursing home residents provide minimum standards that all nursing homes must follow. Many states, however, go beyond these statutory minimums and impose stricter requirements on nursing homes seeking to involuntarily discharge a resident.<sup>113</sup> For example, in Maine, discharged residents who need home health care or another nursing facility must be given contact information for all licensed providers that serve the area in which the resident resides.<sup>114</sup> Michigan mandates that nursing homes provide the discharged resident with counseling services to minimize the potential adverse effects of the discharge.<sup>115</sup>

Additionally, some states require nursing home staff to meet personally with the residents and their families to discuss any con-

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109. Steven A. Hitov, *Transfer Trauma: Its Impact on the Elderly*, 8 CLEARINGHOUSE REV. 846, 846-47 (1975); see *In re Hyman*, No. 91-OAD-008 (D.C. Dep't of Consumer and Regulatory Affairs, Office of Adjudication Mar. 5, 1991), reported in 26 CLEARINGHOUSE REV. 667 (1992) (refusing to allow relocation of a resident because nursing home made no effort to seriously address issue of transfer trauma).

110. Elias S. Cohen, *Legislative and Educational Alternatives to a Judicial Remedy for the Transfer Trauma Dilemma*, 6 AM. J.L. & MED. 405, 406 (1985).

111. *Id.*

112. *E.g.*, 210 ILL. COMP. STAT. 45/3-420 (2011); 10-144-110 ME. CODE R. § 10.Q.4 (LexisNexis 2011); MICH. COMP. LAWS SERV. § 333.21776 (LexisNexis 2011); WIS. ADMIN. CODE § 132-53(3)(b) (2009).

113. *E.g.*, 210 ILL. COMP. STAT. 45/3-420 (2011); 10-144-110 ME. CODE R. § 10.Q.4 (LexisNexis 2011); MICH. COMP. LAWS SERV. § 333.21776 (LexisNexis 2011); WIS. ADMIN. CODE § 132-53(3)(b) (2009).

114. 10-144-110 ME. CODE R. § 10.Q.4.

115. MICH. COMP. LAWS SERV. § 333.21776.

templated transfer or discharge. In Wisconsin, a nursing home must have a planning conference at least fourteen days before the involuntary discharge of a resident to discuss the reason for relocation, assess the effect of the relocation on the resident, and develop alternative plans.<sup>116</sup> Illinois mandates that involuntary discharges be discussed with the resident, his or her representative, and the person or agency responsible for care.<sup>117</sup> This discussion must be documented in the record and counseling must be offered before the resident is discharged.<sup>118</sup> Unfortunately, even with these federal and state regulations, nursing homes continue to unlawfully discharge elderly residents.

### III. Analysis

#### A. Why Nursing Homes Unlawfully Discharge Residents

##### 1. UNDERFUNDING FROM MEDICAID-SPONSORED RESIDENTS

Residents paying for nursing home care via Medicaid are prime targets for unlawful discharge. Nursing homes, like any other business, must make money to remain financially viable. This money comes from payment by residents for their long-term care at the nursing home facility. Medicaid-sponsored residents, however, end up paying nursing homes much less than similarly situated residents paying via Medicare or private funds.<sup>119</sup> Due to this discrepancy, residents paying via Medicaid make an attractive target for nursing homes to unlawfully discharge.<sup>120</sup> Attempting to involuntarily discharge a resident because of his or her method of payment, however, is illegal under the federal regulations.<sup>121</sup> Yet, nursing homes continue to do so because of the dramatic difference in compensation between what Medicaid-sponsored residents and private pay residents pay nursing homes for providing long-term care.

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116. WIS. ADMIN. CODE DHS § 132-53(3)(b).

117. 210 ILL. COMP. STAT. 45/3-407.

118. *Id.*

119. Eric Carlson, *Twenty Common Nursing Home Problems and the Laws to Resolve Them*, 39 J. POVERTY L. & POL'Y 520, 532 (2010).

120. *Id.*; Francis, *supra* note 3.

121. 42 C.F.R. § 483.12(c)(1) (2009); Carlson, *supra* note 119, at 532.

Medicaid pays nursing homes less than the federal minimum wage required to care for elderly nursing home residents.<sup>122</sup> A recent study found that Medicaid programs across the country underfunded nursing home care by \$5.6 billion in 2010.<sup>123</sup> This meant that, on average, nursing homes received \$7.17 per hour per resident, which is less than the current minimum wage.<sup>124</sup> Typically, Medicaid-sponsored residents pay less than half of what a nursing home can get for a resident paying via Medicare or private funds.<sup>125</sup> Currently, Medicare funding helps compensate for the shortfall caused by Medicaid's underpayment; however, this will no longer be a viable option under proposed Medicare funding cuts.<sup>126</sup>

Funding cuts at the state and federal levels will have serious financial repercussions on nursing homes. The 2010 health care reform bill, the Patient Protection and Affordable Care Act, reduces Medicare funding by more than a half trillion dollars between 2010 and 2019.<sup>127</sup> Moreover, a Medicare rate adjustment enacted in 2009 will cut about sixteen billion dollars for nursing home funding over the next ten years.<sup>128</sup> Many nursing homes rely on Medicare to alleviate the losses they endure from Medicaid underpayment. Thus, as Medicare becomes unable to make up the difference, the effect on the nursing home industry and the residents who need long-term care will be far-reaching.

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122. Press Release, Katharine Lehman, Manager, Pub. Affairs, Am. Health Care Ass'n, New Study: Medicaid Pays Nursing Homes Less Than Minimum Wage (Jan. 12, 2011), available at [http://www.ahcancal.org/News/news\\_releases/Pages/NewStudyMedicaidPaysNursingHomes.aspx](http://www.ahcancal.org/News/news_releases/Pages/NewStudyMedicaidPaysNursingHomes.aspx).

123. *Id.*

124. *Id.*

125. Francis, *supra* note 3.

126. ELJAY, LLC, A REPORT ON SHORTFALLS IN MEDICAID FUNDING FOR NURSING HOME CARE 14–15 (2010), available at [http://www.ahcancal.org/research\\_data/funding/Documents/2010%20Medicaid%20Shortfall%20Report.pdf](http://www.ahcancal.org/research_data/funding/Documents/2010%20Medicaid%20Shortfall%20Report.pdf). Medicare's cross-subsidization of Medicaid continues to play an important role in sustaining nursing home care. In the next decade, however, Medicare payments will not be enough to compensate for Medicaid's shortfalls. *Id.* The shortfall for the two programs combined is estimated at \$2.5 billion for 2010. *Id.*

127. See Memorandum from Richard S. Foster, Chief Actuary, Ctr. for Medicare & Medicaid Servs., Estimated Financial Effects of the "Patient Protection and Affordable Care Act," as Amended, at 8 (Apr. 22, 2010), available at [http://burgess.house.gov/UploadedFiles/4-22-2010\\_-\\_OACT\\_Memorandum\\_on\\_Financial\\_Impact\\_of\\_PPACA\\_as\\_Enacted.pdf](http://burgess.house.gov/UploadedFiles/4-22-2010_-_OACT_Memorandum_on_Financial_Impact_of_PPACA_as_Enacted.pdf) (Medicare cuts from 2010–2019 estimated at \$575 billion).

128. *Funding Cuts Threaten U.S. Nursing Homes*, FOXNEWS.COM (Oct. 5, 2009), <http://www.foxnews.com/politics/2009/10/05/funding-cuts-threaten-nursing-homes/>.

Reduced funding will leave many nursing homes in dire financial conditions. In addition to the Medicare funding cuts, many attempts to balance state budgets during the current recession have further compounded this problem.<sup>129</sup> Now, with baby boomers beginning to reach the age of retirement, this funding discrepancy will become more apparent.<sup>130</sup> As a result, more nursing homes will likely seek to unlawfully discharge residents paying via Medicaid so they can be replaced with more profitable private pay residents.

## 2. RESIDENTS WITH DEMENTIA ARE MORE EXPENSIVE TO CARE FOR THAN OTHERS

Residents posing an excessive burden on the staff of a nursing home often become targets for unlawful involuntary discharge. Frequently, these residents suffer from Alzheimer's disease or another form of dementia.<sup>131</sup> Aggressive or disruptive behavior is one of the most notable characteristics associated with dementia-related illnesses and a frequent cause of admission to a nursing home.<sup>132</sup> Federal regulations mandate that when a resident is difficult, the nursing home should identify an aide who works well with the resident and permanently assign the aide to work with him or her.<sup>133</sup> This rarely happens, however, and instead nursing homes look to evict troublesome or difficult residents.<sup>134</sup> Therefore, the behavioral issues that create the need for a resident's placement in a nursing home also increase the likelihood that the nursing home will attempt to involuntarily discharge the resident.<sup>135</sup>

Nursing homes often shirk their duties under the federal regulations when involuntarily discharging residents with dementia. When attempting to unlawfully discharge a resident with dementia, many nursing homes fail to proffer a legitimate reason for this action.<sup>136</sup> In some cases, discharge of a resident with dementia may be warranted

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129. *Id.*

130. "As Baby Boomers begin to ponder their long-term care needs in the future, it is simply unsustainable for Medicare to continue filling that financial gap." Lehman, *supra* note 122. "As current trends indicate, this problem will only grow worse in the coming years." *Id.*

131. ALZHEIMER'S ASS'N, *supra* note 32, at 40.

132. Vikram Patel & Tony Hope, *Aggressive Behaviour in Elderly People with Dementia: A Review*, 8 INT'L J. GERIATRIC PSYCHIATRY 457, 457 (1993).

133. See 42 C.F.R. § 483.25(f)(1) (2009).

134. Carlson, *supra* note 119, at 532.

135. Knepper, *supra* note 100, at 247.

136. Francis, *supra* note 3.

because of the resident's violent tendencies.<sup>137</sup> Evicting a resident because it is difficult to provide care, however, does not fall into one of the six permissible categories for involuntary discharge.<sup>138</sup> More importantly, it contradicts the level of care that nursing homes are required to provide their residents.

Nursing homes exist to care for people with physical and mental problems, and most nursing home residents are "difficult" in some sense. Moreover, a discharge on these grounds violates the mandate that a nursing home must provide residents with care and services necessary to maintain the residents' "highest practicable physical, mental, and psychosocial well-being, in accordance with the comprehensive assessment and plan of care."<sup>139</sup> This mandate requires that a nursing home fully assess the needs of a resident with dementia upon his or her admission into the nursing home and create a care plan that meets the needs of the resident.<sup>140</sup> Nursing homes, however, frequently disregard this duty and attempt to discharge a resident without making a good faith effort to deal with the resident's difficult behavior.<sup>141</sup>

When attempting to involuntarily discharge a resident for being "difficult," nursing homes frequently misinterpret federal law. In many instances, nursing homes discharging allegedly difficult residents cite the regulatory provision allowing discharge if "the resident's welfare and the resident's needs cannot be met in the facility."<sup>142</sup> This type of argument is misplaced, however, because it only applies if the resident's needs cannot be met in any nursing home facility. The federal government has stated that a nursing home is pro-

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137. 42 C.F.R. § 483.12(a)(2)(iii).

138. *Id.* § 483.12(a)(2)(i)-(vi).

139. *Id.* § 483.25.

140. *Id.* § 483.20(b)(2)(i).

141. *In re Matter of Involuntary Discharge or Transfer of J.S. by Hall*, 512 N.W.2d 604, 613 (Minn. Ct. App. 1994) (affirming the Commissioner of Health's determination that the nursing home failed to demonstrate that it created an appropriate comprehensive care plan that would identify ways to care for the particular resident's difficult behavior); *In re Brown*, No. 91-OAD-090-3 (D.C. Dep't of Consumer and Regulatory Affairs, Office of Adjudication Feb. 20, 1992), reported in 26 CLEARINGHOUSE REV. 666-67 (1992) (overturning discharge of resident because the nursing home failed to conduct a proper assessment of the resident, to determine his needs, and to create an individualized plan of care to meet those needs).

142. 42 U.S.C. §§ 1395i-3(c)(2)(A)(i) (2006), 1396r(c)(2)(A)(i); 42 C.F.R. § 483.12(a)(2)(i).

hibited from using its own inadequate care to justify eviction.<sup>143</sup> Yet nursing homes do not follow the rules.<sup>144</sup>

Nursing homes choose to discharge difficult residents because of the financial incentives associated with requiring less nursing home staff on a day-to-day basis. Residents diagnosed with dementia often need constant monitoring by trained staff to ensure that they do not cause harm to themselves or others.<sup>145</sup> This labor-intensive use of staff requires nursing homes to hire more workers. By having a limited number of residents needing constant supervision during their waking hours, however, a nursing home can employ fewer staff members and thereby keep its costs down. The nursing home industry is in dire financial straits;<sup>146</sup> consequently, if a nursing home can find a way to save money, it will often do so.

Funding is a primary concern for the nursing home industry. Without money, nursing homes are unable to keep their doors open, and elderly nursing home residents are forced to find other ways to satisfy their long-term care needs. This reality leads many nursing homes to unlawfully discharge troublesome or financially insolvent residents in an attempt to replace them with more lucrative and less difficult residents.<sup>147</sup> Acquiring an understanding of why nursing homes unlawfully discharge residents is important. Nursing homes know the rules but continue to break them because of economic incentives. The next undertaking is to understand how nursing homes get away with this type of egregious behavior.

## **B. How Nursing Homes Avoid Liability When Unlawfully Discharging a Resident**

### **1. NURSING HOME RESIDENTS ARE NOT AWARE OF THEIR RIGHTS**

Although the laws regulating nursing homes provide a variety of safeguards for nursing home residents, many residents and their families are unaware of the rights they possess and, therefore, do not

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143. Medicare and Medicaid; Requirements for Long Term Care Facilities, 56 Fed. Reg. 48826, 48839 (Sept. 26, 1991) (codified at 42 C.F.R. § 483.12).

144. Perez, *supra* note 9.

145. *See id.*

146. *See supra* notes 123–30 and accompanying text.

147. Guy Boulton, *Assisted Living Concepts Prompts Anger for Evicting Residents Paying with Medicaid*, MILWAUKEE J. SENTINEL, May 28, 2009, <http://www.jsonline.com/business/46423182.html>.

exercise them.<sup>148</sup> Many books and brochures explain nursing home rights and the legal issues that arise in the context of nursing home care.<sup>149</sup> Unfortunately, not enough nursing home residents read these informational texts, and nursing homes do not provide residents with any sort of education.<sup>150</sup>

Nursing homes are obligated to provide recently admitted residents with information regarding their rights upon admission.<sup>151</sup> In practice, however, this rarely occurs.<sup>152</sup> As a result, many nursing homes unlawfully discharge residents without the residents or their families knowing that the nursing home's actions were unlawful or that they could appeal the decision in question.<sup>153</sup> Even if nursing home residents are aware of their rights, many fear retaliation if they attempt to challenge a nursing home's decision to discharge them.<sup>154</sup> The general lack of education for nursing home residents contributes to the recent influx of unlawful discharge cases. Accordingly, addressing these educational needs for nursing home residents should be a high priority.

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148. CARLSON & HSIAO, *supra* note 97, at ix; Francis, *supra* note 3; *Bill Aims to End Nursing Home 'Dumping,' supra* note 13.

149. E.g., ANDREA ROUTH & ERIC CARLSON, NAT'L SENIOR CITIZENS LAW CTR., NURSING HOME ADMISSION AGREEMENTS: THINK TWICE BEFORE SIGNING 8 (2007), available at <http://www.helpingyoucare.com/wp-content/uploads/2010/10/agree.pdf>.

150. See BET TSEDEK LEGAL SERVS., "IF ONLY I HAD KNOWN": MISREPRESENTATIONS BY NURSING HOMES WHICH DEPRIVE RESIDENTS OF LEGAL PROTECTION 4-5 (1998), available at [http://www.thehouseofjustice.net/PDF/IfOnly\\_NursingHome.pdf](http://www.thehouseofjustice.net/PDF/IfOnly_NursingHome.pdf).

151. 42 C.F.R § 483.10(b) (2009). The nursing home must inform the resident of his or her rights both orally and in writing in a language that the resident understands. *Id.*

152. See, e.g., BET TZEDEK LEGAL SERVS., *supra* note 150, at 4-5; CARLSON, *supra* note 85; Anne J. Kisor, *Nursing Facility Admission Agreements: An Analysis of Selected Content*, 15 J. APPLIED GERONTOLOGY 294, 305-06 (1996). Each of these works examined nursing home admission agreements and found that many of the agreements either failed to mention certain rights afforded to residents under federal law or misrepresented federal law.

153. *Bill Aims to End Nursing Home 'Dumping,' supra* note 13.

154. Francis, *supra* note 3. For instance, a nursing home resident may fear that the staff will abuse them physically if he or she complains about substandard levels of care in the nursing home.

## 2. NURSING HOME ADMISSION AGREEMENTS ALLOW FOR RESIDENT EVICTION WITHOUT JUST CAUSE

Nursing home admission agreements have become a source of controversy in recent years.<sup>155</sup> Legal scholars and practitioners alike have noted that these admission agreements take advantage of the elderly during a difficult time of their lives.<sup>156</sup> Nursing homes often use these admission agreements to force residents to submit to arbitration in the case of a dispute between the nursing home and the resident.<sup>157</sup> This allows nursing homes to limit both liability and potential costs when disputes arise.

Additionally, nursing homes use admission agreements to facilitate the unlawful eviction of nursing home residents.<sup>158</sup> Although the federal regulations stipulate that the transfer or discharge of a nursing home resident is only allowed for six specific reasons, some nursing home admission agreements grant the right to discharge a resident without just cause.<sup>159</sup> This makes it easy for a nursing home to proffer reasons for the discharge of a nursing home resident.

A recent study conducted in Missouri found that seventeen percent of nursing homes claim the right to discharge a resident from the facility without a reason.<sup>160</sup> The same study also found that forty-six percent of nursing home admission agreements listed at least one reason for the transfer or discharge of a resident that was not allowed under the federal regulations.<sup>161</sup> Some of the reasons listed in these agreements allowed for transfer or discharge if a resident was uncooperative, difficult to handle, "unduly noisy," or "objectionably unti-

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155. See generally *Fairness in Nursing Home Arbitration Act of 2008: Hearing on H.R. 6126 Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 110th Cong. (2008); Lisa Tripp, *A Senior Moment: The Executive Branch Solution to the Problem of Binding Arbitration Agreements in Nursing Home Admission Contracts*, 31 CAMPBELL L. REV. 157 (2009); Ann E. Krasuski, Comment, *Mandatory Arbitration Agreements Do Not Belong in Nursing Home Contracts with Residents*, 8 DEPAUL J. HEALTH CARE L. 263 (2004); Katherine Palm, Note, *Arbitration Clauses in Nursing Home Admission Agreements: Framing the Debate*, 14 ELDER L.J. 453 (2006).

156. See, e.g., Tripp, *supra* note 155, at 161. See generally ROUTH & CARLSON, *supra* note 149.

157. Tripp, *supra* note 155, at 162.

158. CARLSON, *supra* note 85, at 4. See generally ROUTH & CARLSON, *supra* note 149.

159. CARLSON, *supra* note 85, at 1-2; ROUTH & CARLSON, *supra* note 149, at 3.

160. CARLSON, *supra* note 85, at 23. This report noted that nursing home admission agreements in other states have been found to misrepresent relevant law as well. *Id.* at 7.

161. *Id.*



dy.”<sup>162</sup> These reasons are not only illegal but also undermine the realities associated with nursing home care. Because many nursing home residents suffer from dementia-related illness, allowing for eviction based on the impermissible reasons listed above will subject nearly all of these residents to the threat of involuntary discharge from the nursing home facility. Moreover, these types of authorizations are open-ended and, as a result, can be easily manipulated by a nursing home to permit unlawful evictions.

It is critical to examine the interplay of why and how nursing homes unlawfully discharge residents. Financial motivation seems to be a primary contributor to a nursing home’s decision to unlawfully evict a resident. Unfortunately, the financial woes plaguing the nursing home industry do not appear to have an end in sight because of the recent passage of health care reform and the funding shortfalls associated with Medicaid-sponsored residents. Thus, creative solutions that involve additional oversight of the nursing home industry must be advanced.

#### **IV. Recommendations**

The number of nursing homes unlawfully discharging residents is becoming a problem on the national level. The solution, however, is not tied to an overhaul of the regulations, because the current regulations are not being followed. Instead, protecting elderly residents demands solutions that effectively deter and prevent nursing homes from engaging in improper discharge practices by more effectively enforcing the existing regulations. These solutions pursue the following objectives: increasing the level of oversight for nursing homes, holding individuals rather than nursing homes liable, providing better education to residents regarding their rights, and limiting the ways in which nursing homes improperly evict residents.

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162. *Id.* at 24; Francis, *supra* note 3.

### A. Increase the Level of Oversight for Nursing Homes Wishing to Involuntarily Discharge a Resident

A combination of state and federal agencies regulate nursing homes.<sup>163</sup> These agencies conduct periodic inspections of nursing home facilities to ensure compliance with nursing home regulations.<sup>164</sup> Moreover, the federal government administers a nationwide Long-Term Care Ombudsman Program.<sup>165</sup> This program investigates and resolves complaints made by elderly individuals who live in long-term care facilities.<sup>166</sup> Oddly, however, nursing homes are not required to notify these agencies or the state ombudsman when they attempt to involuntarily discharge a resident from the facility.<sup>167</sup> Instead, the only requirement relating to any of these agencies is that the involuntary discharge notice must provide the name and number of the state's ombudsman.<sup>168</sup> The lack of oversight during the involuntary discharge process seriously undermines the federal regulations' protection of nursing home residents from wrongful eviction.

As a way of limiting facilities' ability to unlawfully discharge residents, all nursing homes should be required to notify the state long-term care ombudsman office before a discharge takes place. This notification should be in writing and provide a statement of facts that allows the ombudsman to determine whether the nursing home is violating federal law by discharging the resident. To ensure that the facts provided to the ombudsman are accurate, the resident or the resident's guardian should personally sign the statement of facts attesting to its validity. This requirement will allow the ombudsman to keep records of all involuntary discharge proceedings in each state as well as question or prevent the unlawful discharge of a nursing home resident when the stipulated facts do not support the discharge. Overall, this solution would be an efficient way to promote the rights of nurs-

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163. In most states, nursing homes are regulated by the state Department of Health. At the federal level, nursing homes are regulated by the U.S. Department of Health and Human Services.

164. GOV'T ACCOUNTABILITY OFFICE, NURSING HOME QUALITY: IMPLEMENTATION OF THE QUALITY INDICATOR SURVEY 12 (2011), available at <http://www.gao.gov/new.items/d11403r.pdf>.

165. KRISTEN J. COLELLO, CONG. RESEARCH SERV., OLDER AMERICANS ACT: LONG-TERM CARE OMBUDSMAN PROGRAM 1 (2009), available at <http://aging.senate.gov/crs/aging12.pdf>.

166. *Id.*

167. See 42 C.F.R. § 483.12(d) (2009).

168. *Id.* § 483.12(a)(6)(v).

ing home residents without inflicting an undue burden on the nursing home seeking to involuntarily discharge a resident. Moreover, empowering ombudsmen in this manner may improve the overall knowledge that residents and their families have about their rights by giving them information about the appropriate person to contact when they suspect nursing homes are acting improperly.

Like all other solutions, this one is not without its shortcomings. If a nursing home decides to ignore this requirement, there would be no way for the ombudsman to know when a nursing home is unlawfully discharging a resident. Experts have noted that state ombudsman programs are understaffed, so it may not be possible for them to handle the workload that this sort of oversight would create.<sup>169</sup> Moreover, even if the resident or the resident's guardian were to sign the statement of facts, the nursing home may attempt to skew the facts in a way that allows for the lawful involuntary discharge of the resident. Nonetheless, this solution would provide a step in the right direction and allow the state ombudsman programs the opportunity to protect the elderly population they serve.

## **B. Hold Nursing Home Administrators Personally Liable for Unlawful Discharge of a Resident**

### **1. FINES AND PENALTIES IMPOSED ON NURSING HOMES**

Some believe that fines and penalties provide the best method of preventing nursing homes from unlawfully discharging residents.<sup>170</sup> Proponents reason that nursing homes will be deterred from unlawfully discharging residents if they could be subject to sanctions. This solution, however, has weaknesses. First, nursing homes have an economic incentive to unlawfully discharge residents who are Medicaid beneficiaries or require substantial supervision.<sup>171</sup> This incentive may lead nursing homes to ignore the threat of fines or sanctions. Indeed, nursing homes may decide that the occasional fine or sanction is

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169. COLELLO, *supra* note 165, at 5–6.

170. Ellen J. Scott, *Punitive Damages in Lawsuits Against Nursing Homes*, 23 J. LEGAL MED. 115, 128–29 (2002); Heather Gillers, *Nursing Homes Force Out Residents*, INDIANAPOLIS STAR, Dec. 19, 2010, at A1.

171. *See supra* Part III.A.

tolerable if they can reap the financial benefits of unlawfully discharging a resident in other instances.<sup>172</sup>

Second, even if the fines and penalties are set at a level that substantially affects the financial well-being of the nursing home, the elderly nursing home residents will suffer as well. No doubt sizeable fines and penalties will deter some nursing homes from improperly evicting residents. This type of result would, at least in the short term, benefit elderly residents. Nevertheless, the potential long-term repercussions make this solution less desirable.

Imposing substantial fines on nursing homes for violations may adversely affect nursing home residents because the home will pass the additional costs onto the residents. Raising the cost of a nursing home will lead to a smaller portion of the older population being able to afford the level of care that they need. More significantly, if a nursing home is forced to shut down, the residents of the facility suffer the most because they must find a suitable replacement for their long-term care. Solutions that hurt the elderly residents, who are supposed to be protected, are counterproductive and undesirable. Instead, more creative solutions must be advanced to effectively use fines and penalties as a deterrent.

## 2. EXPOSE NURSING HOME ADMINISTRATORS TO LIABILITY FOR UNLAWFUL DISCHARGE OF RESIDENTS

Rather than fine or sanction the nursing home facility, it may be more efficient to punish the nursing home administrator who approves the decision to involuntarily discharge the resident. Nursing home administrators serve as the chief executive officers of nursing home facilities.<sup>173</sup> As part of their duties, nursing home administrators must ensure the quality of care for the residents of the facility.<sup>174</sup> Additionally, nursing home administrators are the individuals who ultimately approve the decision to involuntarily discharge a resi-

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172. See Gillers, *supra* note 170 (discussing the small penalties nursing homes who break the law must pay); Perez, *supra* note 9 (noting that the fines levied on the nursing home that violated federal law was less than \$3,000).

173. REBECCA PERLEY & KENNETH MERCHANT, CAL. DEP'T OF PUB. HEALTH, NURSING HOME ADMINISTRATOR: GUIDE TO AN AMAZING CAREER 6 (2006), available at <http://www.cdph.ca.gov/certlic/occupations/Documents/NHA0906online.pdf>.

174. *Id.*

dent.<sup>175</sup> Because nursing home administrators make the ultimate decision to discharge a resident, holding them personally accountable for their decisions may provide a valuable deterrent against unlawful involuntary discharges. Of course, the question of how liability may be imposed on administrators absent legislative reform poses a significant impediment to this proposed solution. One idea, however, holds nursing home administrators liable to nursing home residents through agency law.

Agency law provides a framework for holding a nursing home administrator culpable for the unlawful eviction of a resident. Under agency law, an agent owes the principal a fiduciary duty to act in the principal's best interest.<sup>176</sup> This concept is commonly referred to as the duty of loyalty.<sup>177</sup> When a resident enters into an agreement with a nursing home, the situation is similar to that of an agency relationship.<sup>178</sup> An admission agreement between the resident and the administrator can be characterized as a manifestation of assent from the resident to the administrator that the administrator is to act on behalf of the resident and in the resident's best interest.<sup>179</sup> Therefore, under an agency analysis, the principal would be the nursing home resident, and the agent would be the nursing home administrator.<sup>180</sup> Using this

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175. *E.g.*, ILL. DEP'T OF HEALTH, NOTICE OF INVOLUNTARY TRANSFER OR DISCHARGE AND OPPORTUNITY FOR HEARING 3 (2007), available at [http://www.idph.state.il.us/forms/ohcr/invol\\_discharge.pdf](http://www.idph.state.il.us/forms/ohcr/invol_discharge.pdf); MICH. DEP'T OF CMY. HEALTH, NOTICE OF AN INVOLUNTARY TRANSFER OR DISCHARGE 1 (2011), available at [http://www.michigan.gov/documents/mdch/bhs\\_ops-502\\_Notice\\_of\\_an\\_Inv\\_Transfer\\_Form\\_321798\\_7.pdf](http://www.michigan.gov/documents/mdch/bhs_ops-502_Notice_of_an_Inv_Transfer_Form_321798_7.pdf).

176. RESTATEMENT (THIRD) OF AGENCY § 8.01 cmt. b (2006). An agent has a duty to the principal to act loyally in the principal's interest in all matters in connection with the agency relationship. *Id.* § 8.01.

177. J. DENNIS HYNES & MARK J. LOEWENSTEIN, AGENCY, PARTNERSHIP, AND THE LLC IN A NUTSHELL 62 (4th ed. 2008). The duty of loyalty mandates that the agent put the principal's interests above his or her own interests. *Id.* The scope of the duty owed by the agent to the principal can vary, but it is important to note that the principal does not need to show any type of loss to bring a claim for a breach of the duty of loyalty. *Id.* at 63–64.

178. *See* RESTATEMENT (THIRD) OF AGENCY § 1.01 (2005). "Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act." *Id.*

179. *See id.*

180. *See id.* There may be some disagreement as to whether the nursing home resident exercises sufficient control over the administrator in this context. For instance, an administrator is not required to comply with all requests of a nursing home resident. PERLEY & MERCHANT, *supra* note 173, at 6. On the other hand, be-

agency framework, the situation where a nursing home administrator unlawfully evicts a resident can be examined.

When a nursing home administrator improperly discharges a nursing home resident, the administrator is breaching a duty of loyalty to the resident. First and foremost, an administrator ensures the safety and health of the facility's residents by acting in a manner designed to promote their overall health and well-being.<sup>181</sup> Many nursing homes and their administrators choose to ignore this responsibility and instead elect to unlawfully discharge residents in the interest of financial gain for the nursing home.<sup>182</sup> This type of situation is akin to an agent putting his or her own financial interests in the place of the principal's, an obvious breach of the duty of loyalty. Consequently, the nursing home administrator should be held liable for this breach.

Attempting to hold plan administrators liable may run into some potential problems. One possible pitfall is indemnification.<sup>183</sup> If plan administrators are subject to potential financial liability for unlawfully discharging a resident, nursing homes may agree to indemnify them for any potential financial losses they endure. This would reduce the disincentive inherent in financial penalties. To counteract this concern, states could pass legislation that prohibits nursing homes from indemnifying their administrators for penalties assessed as a result of the unlawful discharge of a resident. Of course, nursing home administrators may then seek to secure private insurance policies to protect themselves from any large financial penalty. Nonetheless, the administrator would still be paying insurance premiums out of his or her

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cause an administrator is tasked with meeting the needs of the resident on a daily basis, sufficient control might be sustained in this context. *See id.*

181. PERLEY & MERCHANT, *supra* note 173, at 6.

182. *See supra* Part III.A.

183. Indemnification is a form of restitution that gives one party the legal obligation to make another party whole after that other party suffers a loss from a third party. 41 AM. JUR. 2D *Indemnity* § 1 (2010). In other words, one party agrees to hold another party harmless for loss or damage of some kind, and the indemnitor (A) promises the indemnitee (B) that A will indemnify B in the case of any loss resulting from liability to a third party for conduct by B. *Id.* In the case of a plan administrator, liability would result from the administrator's breach of his or her duty of loyalty to the nursing home resident. *See id.*; RESTATEMENT (THIRD) OF AGENCY § 8.01(a)-(b). Indemnification, however, can occur in many different contexts. *See, e.g.*, 3 AM. JUR. 2D *Agency* § 243 (2010); 27 AM. JUR. 2D *Employment Relationship* § 197 (2010).

own pocket, which would provide some disincentive against unlawful discharge of residents.

### C. Provide Education to Residents Regarding Their Rights in the Nursing Home

Educating elderly residents and their families regarding their rights in a nursing home may help prevent unlawful involuntary discharges. Many evicted nursing home residents never learn of their right to appeal the involuntary discharge decision.<sup>184</sup> Rather, the resident simply goes along with the process and is burdened with the task of finding a new place of residence that can meet his or her long-term care needs.<sup>185</sup> A potential solution to this problem would be to hold bi-annual presentations for residents and their families about their rights while living at the nursing home.

Providing educational presentations to elderly residents would not be unduly burdensome or expensive for nursing homes. This proposed solution would require nursing homes to find a speaker, such as a local elder law attorney or ombudsman, who could visit the nursing home and explain how federal and state regulations provide nursing home residents with a number of protections and rights. Most nursing homes would not need to reserve additional space for the presentation because it could be held directly at the nursing home facility. Moreover, because this reform only suggests bi-annual presentations to residents, the costs associated with finding a speaker for the presentation would not be unduly expensive. In fact, some nursing homes may be able to have a local volunteer ombudsman give presentations at no cost.

Even if the above solution is deemed too burdensome for nursing home facilities, there are other more economically viable ways to educate residents and their families about their rights. The National Senior Citizens Law Center published a book written by Directing Attorney Eric Carlson entitled: *20 Common Nursing Home Problems—And How to Resolve Them*.<sup>186</sup> This book discusses twenty common issues that frequently arise during the long-term care of an elderly resi-

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184. Others do not find out about their right to challenge the unlawful discharge until years after the elderly resident has been evicted from the nursing home facility. *E.g.*, *Bill Aims to End Nursing Home 'Dumping,' supra* note 13.

185. *Id.*

186. Carlson, *supra* note 119, at 520.

dent.<sup>187</sup> If nursing homes were required to provide this informative book to residents and their families upon admission to the facility, more residents would be aware of their right to appeal a proposed involuntary discharge. Ultimately, education for nursing home residents regarding their rights will be one of the most effective methods of protecting elderly residents from involuntary discharge because they will have the knowledge to protect themselves.

#### **D. Declare Nursing Home Admission Agreements that Limit Nursing Home Liability or Resident's Rights Null and Void**

Nursing homes should not be given carte blanche to circumvent the law and discharge a resident simply because of an admission agreement. Instead, admission agreements that include clauses that limit nursing home duties articulated in the federal regulations should be considered null and void. The federal regulations exist to ensure the protection and safety of nursing home residents. When nursing homes discharge residents unlawfully, the residents' health and safety can be jeopardized due to transfer trauma.<sup>188</sup> Thus, continuing to allow nursing homes to effectively ignore these rules by placing liability-limiting clauses in nursing home admission agreements makes the statutory protections offered to nursing home residents inconsequential.

To prevent this from occurring, nursing home admission agreements that attempt to limit a resident's rights under federal and state regulations should be considered null and void. States should also consider drafting model nursing home admission agreements that nursing homes must use when admitting residents.<sup>189</sup> The state long-term care ombudsman office should approve any deviations from the language of the model admission agreement. Use of the model admission agreements could be tied directly to certification of the nursing home by the state as an accredited facility. This would provide

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187. *Id.*

188. See Hitov, *supra* note 109, at 846–47; Francis, *supra* note 3; see also Nicholas G. Castle, *Relocation of the Elderly*, 58 MED. CARE RES. REV. 291 (2001) (discussing a number of different studies on transfer trauma and its impact on the elderly).

189. See, e.g., GERONTOLOGY INST., UNIV. OF MASS., BOS., MODEL NURSING FACILITY ADMISSION AGREEMENT, [http://www.umb.edu/editor\\_uploads/images/centers\\_institutes/institute\\_gerontology/Model\\_nursing.pdf](http://www.umb.edu/editor_uploads/images/centers_institutes/institute_gerontology/Model_nursing.pdf).



nursing homes with an incentive to use the admission agreements and not to attempt to circumvent the law.

Use of model admission agreements, however, is not a perfect solution. Although it would help ensure that nursing homes do not attempt to broaden their ability to discharge a resident beyond the statutorily defined situations, this recommendation would not completely protect nursing home residents. Nursing homes unlawfully evict residents without proper cause in many instances. Thus, the fact that an admission agreement does not list the reason as permissible would not impede some nursing homes from breaking the law. Additionally, this solution assumes that nursing homes would actually send their state ombudsman any admission agreements that deviate from the model agreement provided. This will not always be the case, and thus, the protection that a model admission agreement would afford to residents would have little consequence. Nevertheless, the use of model admission agreements would at least provide nursing home residents and their families with better information about their rights at the time the resident is admitted. This in turn would increase the probability that nursing home residents would know when their rights are being violated.

## V. Conclusion

Clearly, the current state of federal involuntary discharge law is in disarray. Nursing homes continue to violate federal regulations, leaving residents and their families struggling to pick up the pieces. As the elderly population expands, the need for proper enforcement of these regulations will be essential to the safety and protection of elderly nursing home residents. Many nursing homes violate the law because of the financial incentives associated with the unlawful eviction of certain residents. Moreover, nursing homes continue to avoid any liability for their actions. The solutions proposed above are designed to deter nursing homes from engaging in unlawful involuntary discharge of their residents. Unfortunately, however, no single solution will completely resolve the issue. Rather, to protect nursing home residents, the solutions discussed should be promoted together as a means of providing additional oversight over the nursing home industry. Oversight of the nursing home industry, however, should not end with these solutions. Instead, the general population that re-

lies on nursing homes to care for their elderly loved ones needs to address unlawful discharges and work to prevent them. Only then will the nursing home population truly be safe from unlawful involuntary discharge.

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