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PLEADING AND DISCOVERY STRATEGIES IN  
THE NURSING HOME MALTREATMENT CASE

BY

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# PLEADING AND DISCOVERY STRATEGIES IN THE NURSING HOME MALPRACTICE CASE<sup>1</sup>

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## **§1.01 -- Introduction**

The most important decision made on a recurrent basis by the personal injury practitioner is the decision to accept a case and invest time, experience and money towards its resolution. The lawyer prone to accept a number of speculative or marginal cases is destined to drain his or her office of the substantial energy and resources needed to pursue meritorious cases. Perhaps nowhere is this more true than in the evaluation of cases arising out of the alleged negligent conduct of health care professionals and long term care institutions. The cost of development, in terms of time and money, is so demanding that the initial determination as to whether a case is meritorious is of primary importance.

As a general rule, the screening of this type of case involves two fundamental decisions: 1) Is the evidence sufficiently aggravating to support a substantial damage award? and 2) Can the resident's injury be causally linked to a breach of duty on the part of defendant?

A proper evaluation of the facts and understanding of the complex issues involved is essential to the drafting of pleadings and discovery in the nursing home case. Accordingly as a predicate to pleading and discovery strategies, the following topics will be considered: 1) common evaluation concerns; 2) causation problems; 3) key damage elements and appraisal questions; 4) comparative verdicts and settlements; and 5) factors influencing the size of a verdict or settlement. This discussion is followed by an examination of: 1) the causes of action that are generally available to plaintiff in a nursing home case; and 2) the pleadings and initial discovery in such case.

## **§ 1.02 -- Common Evaluation Concerns**

Evaluation of the nursing home malpractice treatment case begins with the proposition that the criteria traditionally utilized to assess the potential and quantity of recovery in a personal injury case (and for that matter, in a medical malpractice case) are simply not applicable to litigation arising out of neglect and injury of a long term care resident. Characteristically, in a significant personal injury case, plaintiff's health status at the time of the injury (made the basis of the lawsuit) makes him or her eligible for the full spectrum of traditional tort damages. In such a case, plaintiff's capacity for life and earnings, measured from that point in time when the injury is sustained, is sufficient enough to allow recovery for: 1) lost earning potential; and 2) future health care expenses. From a quantitative value perspective, the huge discrepancy between plaintiff's "before injury picture" and "after injury picture" constitutes the lifeblood of the significant personal injury case.

In a lawsuit filed on behalf of a nursing home resident for injuries or death allegedly caused by the wrongful conduct of a health care facility, the gap separating plaintiff's "before injury picture" and "after injury picture" is substantially smaller and arguably indistinguishable in many cases. Typically, plaintiff in a nursing home case is 67 to 95 years of age; frail and dependant upon the nursing staff for assistance with such basic activities of daily living as toileting, bathing, and ambulation<sup>2</sup>; and a recipient of Medicaid assistance.<sup>3</sup> Furthermore, plaintiff in such a case characteristically suffers from a cluster of maladies and diseases; commonly resembles a living chemistry set due to the large number of medications required to control pre-existing conditions; and universally has a very limited life expectancy. As a consequence thereof, plaintiff is not a candidate for damages based upon lost earning potential. The potential to earn wage or salary in most instances was impaired long before the resident entered the nursing home in question. In all likelihood, plaintiff's only source of income is a monthly Social Security check, the majority of which is paid to the nursing home.<sup>4</sup> Moreover, the ability of a nursing home victim to recover residual damages based upon continuing health care expenses; future pain, suffering and mental anguish; and diminished capacity to enjoy life in the future is severely limited by reason of the reduced and questionable length of plaintiff's life expectancy.

The foregoing case realities translate into the following significant liability and damage hurdles:

- o How can plaintiff unravel the sequelae (effect) of neglect from the sequelae of underlying disease processes?
- o As a practical matter, given the deteriorated health status and limited life expectancy of the resident upon admission to the nursing home, how has the conduct of the facility altered the resident's future?
- o Given these same realities, what is the likelihood of establishing a residual injury which will support a substantial award for future medical expense?

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<sup>2</sup>See Butler, *Nursing Home Quality of Care Enforcement, Part I -- Litigation by Private Parties*, 14 CLEARINGHOUSE REV.. 622, 641 (1980).

<sup>3</sup>Eighty-three percent of all single residents entering a nursing home are impoverished within 12 months of admissions. Fifty-eight percent of the married residents are impoverished within 12 months of admission. Of those individuals who enter a convalescent facility as private pay patients, 92% of the single residents and 80% of the married residents will "spend down" their income and resources to a poverty level within 104 weeks. Such spend down suggest that private patients are inevitably transformed into Medicaid recipients. BARRON'S MAGAZINE, June 2, 1986, and U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, *Technical Work Group on Private Financing at Long-Term Care for the Elderly*, p. 2-21.

<sup>4</sup>Such maintenance deductions can result in a net income of \$25-\$30 per month for the resident.

- o Can a causal link between the alleged nursing home neglect and the destruction of capacity to earn wage or enjoy life be established?
- o Have the statutory beneficiaries of the resident suffered any 1) pecuniary loss, 2) mental anguish, 3) impairment of familial interests or 4) loss of inheritances as a result of said resident's wrongful death?

In the past, the inability of attorneys to overcome these obstacles has caused the plaintiff's bar to be unenthusiastic about nursing home maltreatment cases. However, since 1984 a growing number of litigators have consistently obtained six- and seven-figure verdicts and settlements ranging up to \$4.3 million<sup>5</sup> for personal injury, wrongful death and survival actions arising out of the neglect of nursing home residents. Their efforts not only have established the principle that the quantitative value of a nursing home case cannot be accurately measured by traditional personal injury discriminators (such as those questions posed herein above) but also have given rise to clear fact patterns customarily associated with high verdict and settlement value. These patterns, as well as the legal and factual issues occasioned by such litigation are explored throughout the remainder of this article.

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<sup>5</sup>*Survey of Nursing Home Verdicts and Settlements*, e.g., Paasch and Manson, *Nursing Home Chain to Pay \$4.5 Million for Gross Neglect*, HOUSTON POST, Apr. 19, 1986 at 1A.

### **§1.03 Causation: The Determinant Variable**

Before accepting a case founded upon allegations of nursing home neglect, the attorney for the injured resident must be satisfied that the omissions or acts of the defendant can be causally linked to the injury of the plaintiff. The injury suffered by the resident must be a natural and continuous product of the defendant's conduct, without which such injuries would not have occurred.<sup>6</sup>

It is a fundamental principle of the law of torts that a person who suffers injury is entitled to recover damages only if a connection between such damages and the wrongful conduct of the defendant can be established. There can be no recovery of damages if: 1) plaintiff's injury merely coincides with the proscribed activities of the defendant but is not causally related to plaintiff's condition; 2) plaintiff's injury was the condition of existing disease processes not caused by defendant's conduct; or 3) the expense, pain, suffering and mental anguish suffered by plaintiff would have occurred even in the absence of the injury which serves as the basis for the cause of action.

#### **[A] Pre-Existing Condition**

It is well settled that an injured person is entitled to recover full compensation for all damage proximately resulting from the defendant's acts, even though his injuries may have been aggravated by reason of his pre-existing physical or mental condition, rendered more difficult to cure by reason of his state of health, or more serious because of a disease<sup>7</sup>, than they would have been had he been in robust health. Pre-existing

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<sup>6</sup>The traditional test of causation is the "but for" or "sine qua non" test. Under this test, causation exists when the injury would not have occurred "but for" the defendant's tortious conduct. In recent years, the "substantial factor" test has been advocated as a replacement for the "but for" test. A force or condition is deemed a cause of a victim's harm when it was a "substantial factor" in bringing about that result, *id. at p. 1356*.

<sup>7</sup>King, *Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences*, 90 YALE L J 1353 (1981)

Complaint, petition, or declaration -- Allegations of aggravation of pre-existing physical condition. 8 AM JUR PL & PR FORMS (Rev), DAMAGES, Forms 16, 17.

Instructions to jury -- Liability for aggravation of pre-existing condition. 8 AM JUR PL & PR FORMS (Rev), DAMAGES, Form 225.

VALDEZ V. LYMAN ROBERTS HOSP. INC. 638 swzd 111 (Tex. App.--Corpus Christi, 1982, writ ref'd n-r-e); STOLESON V. UNITED STATES (CA7 Wis) 708 F2d 1217 (fact that the plaintiff's vulnerability because of a pre-existing condition is psychological (predisposition to hypochondria) rather than physical is irrelevant); MAURER V. UNITED STATES (CA2 NY) 668 F2d 98; HENDERSON V. UNITED STATES (CA5 Ala) 328 F2d502 (action under Federal Tort Claims Act; stating law of Alabama); BOWLES V. ZIMMER MFG. Co. (CA7 Ind) 277 F2d 868, 76 ALR2d 120; CENTRAL DISPENSARY & EMERGENCY HOSPITAL, INC. V. HARBAUGH, 84 App DC 371, 174 F2d 507; OLIVER V. YELLOW CAB CO. (CA7 Ill) 98 F2d 192; UNDERWOOD V. SMITH, 261 Ala 181, 73 So 2d 717 (prior injury); INTERMILL V. HEUMESSER, 154 Colo 496, 391 P2d 684; TURNER V. SCANLON, 146 Conn 149, 148 A2d

weakness which results in the plaintiff suffering a worse injury than a normal person would suffer from the defendant's negligence is not in itself a grounds for defeating causation.<sup>8</sup> Thus, one who violates the duty, imposed by law, of exercising due care not to injure others may be compelled to respond in damages for all the injuries which he inflicts by reason of the violation of such duty, even if a particular injury may have been aggravated by or might not have happened at all except for the peculiar physical condition of the injured person. This is the maxim that "the defendant takes the plaintiff as he finds him," or the "thin skull" or "eggshell skull" rule.<sup>9</sup> Phrases such as

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334; FLOOD v. SMITH, 126 Conn 644, 13 A2d 677; C.F. HAMBLIN, INC. v. OWENS, 127 Fla 91, 172 So 694; WISE v. CARTER (Fla App D1) 119 So 2d 40; DZURIK v. TAMURA, 44 Hawaii 327, 359 P2d 164; REED v. HARVEY, 253 Iowa 10, 110 NW2d 442; KNOBLOCK v. MORRIS, 169 Kan 540, 220 P2d 171; LOUISVILLE TAXICAB & TRANSFER CO. v. HILL, 304 Ky 565, 201 SW2d 731; LAPLEINE v. MORGAN'S L. & T. R. & S. S. CO., 40 La Ann 661, 4 So 875; WALTERS v. SMITH, 222 Md 62, 158 A2d 619, 2 ALR3d 482; COCA COLA BOTTLING WORKS, INC. v. CATRON, 186 Md 156, 46 A2d 303; Royer v. Eskovitz, 358 Mich 279, 100 NW2d 306, 2 ALR3d 286; NELSON v. TWIN CITY MOTOR BUS CO., 239 Minn 276, 58 NW2d 561; SMART v. KANSAS CITY, 208 Mo 162, 105 SW 709; RAWSON v. BRADSHAW, 125 NH 94, 480 A2d 37 (instruction that plaintiff was entitled to damages even though some of the injuries may have been rendered more difficult to cure by reason of plaintiff's existing state of health conveyed idea that his injuries might have been aggravated or precipitated by reason of his pre-existing condition); HEBENSTREIT v. ATCHISON, T. & S. F. R. Co., 65 NM 301, 336 P2d 1057; REEG v. HODGSON (Scioto Co) 1 Ohio App 2d 272, 30 Ohio Ops 2d 293, 95 Ohio L Abs 148, 202 NE2d 310 (aggravated or accelerated); MAYNARD v. OREGON R. & N. Co., 46 Or 15, 78 P 983 (ovrld on other grounds) FEHELY v. SENDERS, 170 Or 457, 135 P2d 283, 145 ALR 1092); WATSON v. WILKINSON TRUCKING CO., 244 SC 217, 136 SE2d 286; COBB v. WADDELL, 51 Tenn App 458, 369 SW2d 743, 2 ALR3d 457; WATFORD v. MORSE, 202 Va 605, 118 SE2d 681; GREGORY v. SHANNON, 59 Wash 2d 201, 367 P2d 152, 2 ALR3d 397; FRENCH v. CHASE, 48 Wash 2d 825, 297 P2d 235.

Instructions to jury -- Effect of Plaintiff's susceptibility to injury because of previous infirm condition. 8 AM JUR PL & PR FORMS (Rev), DAMAGES, Form257.

Proof, by testimony of plaintiff, of good health or disability prior to injury. 3 AM JUR POF 491, DAMAGES, Proofs 24, 25.

HOLEMAN v. T. I. M. E. FREIGHT, INC. (WD Ark) 236 F Supp 462; OWEN v. DIX, 210 Ark 562, 196 SW2d 913; BRUNEAU v. QUICK, 187 Conn 617, 447 A2d 742; POZZIE v. MIKE SMITH, INC. (1st Dist) 33 Ill App3d 343, 337 NE2d 450; GALLARDO v. NEW ORLEANS S.B. CO. (La App 4th Cir) 459 So 2d 1215; OWENS v. KANSAS C., S. J. & C. B. R. CO., 95 Mo 169, 8 SW 350 (disapproved on other grounds Moore v. Ready Mixed Concrete Co. (Mo) 329 SW2d 14); STERRETT v. EAST TEXAS MOTOR FREIGHT LINES, 150 Tex 12, 236 SW2d 776; REEDER v. SEARS, ROEBUCK & Co., 41 Wash 2d 550, 250 P2d 518.

<sup>8</sup>22 AM JUR 2d, DAMAGES, §281.

<sup>9</sup>A person injured by the negligence of another is entitled to recover to the full extent of the injury so caused without regard to whether, owing to his previous condition of health, he is more or less liable to injury. Purcell v. St. Paul C. R. Co., 48 Minn 134, 50 NW 1034.

Recovery for frostbite was allowed even though plaintiff's poor blood circulation rendered her more susceptible to frostbite than a person in normal health. OWEN v. ROCHESTER-PENFIELD BUS CO., 304 NY 457, 108 NE2d 606, 33 ALR 2d 1354.

pre-dispositions, latent illnesses, dormant conditions and "the defendant takes the plaintiff as he finds him," all illustrate the attempt of the rules to deal with the fact that most people are not perfect specimens and a defendant may not avoid a claim of damages by pointing out this self-evident circumstance.<sup>10</sup>

The foregoing rules are of particular importance in a nursing home maltreatment case, given the susceptibility and vulnerability of residents to injury. Rare indeed is the case where the pre-existing condition, weakness and frailty of the victim does not form the nucleus of the nursing home's defense, with the thrust of the facility's argument being: the injury sustained by the nursing home resident was the inevitable product of his or her compromised health status/physical weakness (which was present at time of admission to the facility in question) rather than the result of any neglect by defendant. The argument advanced by the defense revolves around the question of "cause in fact" as opposed to "foreseeability," thereby obligating plaintiff to show that the injury was more probably the result of external forces for which defendant is responsible rather than the internal pre-existing weaknesses of plaintiff.

The relationship between any injury and a pre-existing condition depends principally upon: 1) the status of underlying disease process present at the time of infliction of the alleged neglect; and 2) the severity and extent of the alleged neglect. In most nursing home maltreatment cases, the pre-existing conditions of plaintiff have been known and treated for many years prior to admission into defendant's facility. Accordingly, the key question relating to the status of plaintiff's pre-existing condition necessarily focuses upon the stability or rate of deterioration of any *relevant* disease processes affecting plaintiff's health. Frequently, the nursing home resident suffers from a pre-existing condition which, it may be supposed, would eventually cause further disability and death. The rate of expected deterioration is then subsequently altered by reason of the negligent conduct of defendant nursing home, causing the adverse condition to occur at a precise time. In other words, absent the wrongful conduct, the adverse condition would not have manifested at this particular time. Such a result is often referred to as "accelerating" or "hastening" the condition in question. It

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UNDERWOOD V. SMITH, 261 Ala 181, 73 So 2d 717; MOURISON V. HANSEN, 128 Conn 62, 20 A2d 84, 136 ALR 413; SQUIRES V. REYNOLDS, 125 Conn 366, f A2d 877; SANSONNI V. JEFFERSON PARISH SCHOOL BD. (La App 4th Cir) 344 So 2d 42, cert den (La) 346 So 2d 209 (plaintiff who suffered from congenital defect rendering his bones unusually brittle and susceptible to fracture with a minimum of force was entitled to substantial damages even though a normal child would have sustained only a bruise from the type of slip and fall accident that occurred); OWEN V. ROCHESTER-PENFIELD BUS CO., 304 NY 457, 108 NE2d 606, 33 ALR2d 1354; LOCKWOOD V. McCASKILL, 262 NC 663, 138 SE2d 541; FLORIG V. SEARS, ROEBUCK & CO., 388 Pa 419, 130 A2d 445.

Bahr and Graham, *Thick Skull Plaintiff Concept: Evasive or Persuasive*, 15 LOYOLA L REV (Los Angeles) 409 (1982).

<sup>10</sup>Stein, *Damages and Recovery*, §123.

is generally held in such a case that the defendant has *caused in fact* the result. If a defendant accelerates a decedent's death by even an hour, minutes or seconds, said defendant is liable for such death.<sup>11</sup> Therefore, the plaintiff in a nursing home death case is not required to prove that the decedent, more likely than not, would have ultimately survived if it had not been for the defendant's wrongful acts and omissions.<sup>12</sup> Rather, plaintiff can recover if he is able to show that the decedent's chances of survival would have been greater if it had not been for the nursing home's wrongful acts or omissions. As stated by one Court:

*"The burning candle of life is such a precious light in anyone's existence that no one has a right to extinguish it before it flickers out into perpetual darkness and oblivion."*<sup>13</sup>

### **[B] Red Flag Injuries: Clinical Outcomes Frequently Linked With Nursing Home Neglect**

In screening a potential nursing home maltreatment case, one of the threshold questions the lawyer must address is whether the resident's injury is generally regarded as being linked to deficient care and nursing home neglect. In other words, is the outcome in question commonly recognized as being an indicator of poor care? Such determination is primarily derived from a review of the resident's clinical record coupled with interviews of witnesses who observed the resident's condition; and secondarily, from a review of the teachings, literature and experience of two distinct professional communities -- 1) the health care community, which includes the medical, nursing, pharmaceutical and nursing home professional, and 2) the legal community. As to the former, the pertinent inquiry is: What injuries are generally recognized by the health care community as being caused by a failure to render adequate care? As to the latter, the relevant question is: What types of injuries have been identified by the United States Congress, state regulators, courts, juries, and/or insurance carriers as being associated with a valid claim of nursing home neglect? Answers to these questions are compiled in the illustrative list below.

### **[C] Injuries Precipitated by Progressive Failures and Omissions of Care**

The injuries listed in this category generally result from a prolonged form of neglect, as contrasted with an event which immediately produces an injury, such as a scalding. At the outset, it is important that plaintiff's counsel understand whether the

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<sup>11</sup>Valdez v. Lyman-Roberts Hosp., Inc., 638 S.W.2d 111 (Tex. App. -- Corpus Christi 1982, writ ref'd n.r.e.)

<sup>12</sup>Ibid.

<sup>13</sup>Ibid. at p. 116.

injury in question was caused by recurrent neglect over an extended period of time, or was simply the result of a single event which effectively produced injury to the nursing home resident. The injuries listed below not only have been recognized by the medical and nursing communities as being preventable in nearly all nursing home residents through implementation of ordinary nursing care, but also have been the subject of successful litigation.

- o Decubitus ulcers -- Stage III or IV.
- o Infected decubitus ulcers.
- o Gram negative septicemia, secondary to decubitus ulcer or wound sepsis.
- o Severe dehydration.
- o Severe protein-calorie malnutrition.
- o Septic shock.
- o Gangrene.
- o Osteomyelitis secondary to Stage IV decubitus ulcer.
- o Gram negative septicemia, secondary to long term failures regarding urinary catheter (e.g., failure to appropriately monitor and change urinary catheter).
- o Gram negative septicemia, secondary to urinary tract infection or other localized sepsis.
- o Aspiration/pneumonia.
- o Gram negative or positive septicemia, secondary to pneumonia.
- o Emotional trauma and distress arising out of inhumane conditions and care of a persistent and long-standing nature.<sup>14</sup>

#### **[D] Injuries Precipitated by Medication Prescription and Administration Failures**

Approximately 95 percent of all nursing home patients receive medication on a regular basis. The typical nursing home patient takes five to six medications daily. The over-use or under-use of certain medications can result in serious injury or death.

Drug-related injuries in a nursing home case are usually the result of: 1) inappropriate prescribing by the physician; 2) failure of the nursing home staff to follow physician's instructions by properly monitoring a specific aspect of the patient's condition prior to administering the medication in question; 3) administering

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<sup>14</sup>The list of progressive-failure injuries set forth above is not intended to be all-inclusive. There are surely other injuries that might qualify for inclusion herein. This listing is intended only to identify the most common types of progressive injuries.

medications to the resident despite the presence of adverse symptoms which require immediate physician notification; 4) over- or under-medicating the resident by the nursing home staff; or 5) administering Patient A's medication to Patient B. The following list consists of drug-related injuries that commonly occur in a nursing home setting and are the subject of litigation.<sup>15</sup>

- o Mental or physical deterioration secondary to inappropriate psychotropic medication administration.<sup>16</sup>
- o Digoxin toxicity.
- o Untreated congestive heart failure (such condition may be recognized by the following symptomology: edema, difficulty in breathing - especially in a prone position, chronic cough, swollen ankles, and/or bloated abdomen).
- o Dilantin toxicity.
- o Insulin shock/coma resulting from inappropriate administration of insulin.
- o Improper antibiotic therapy resulting from: 1) the inappropriate prescription and continuation of a broad spectrum antibiotic coupled with the failure to obtain culture and sensitivity or the failure to track the effectiveness of the antibiotic; or 2) the failure to adjust the antibiotic therapy in response to the sensitivity report.
- o Severe fall resulting from the failure to monitor the effects of any hypertensives and anti-arrhythmia drugs or from negligent use of psychotropic drugs.
- o Hyperkalemia resulting from dehydration coupled with the use of any hypertensives, diuretics and/or potassium supplements.
- o Any adverse drug reaction identified in the Physician's Desk Reference or product literature of the drug manufacturer.

### **[E] Injuries Precipitated by Untoward Incidents**

A third category of injuries exists for the purposes of nursing home litigation. This category consists of injuries which can be causally linked to a singular event. In such cases, an efficient cause is said to exist. For example, in a case where a resident has drowned in a whirlpool bath, the cause of death is clearly connected to a singular

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<sup>15</sup>This listing is intended only to identify the most common types of drug-related injuries and is not intended to be an all-inclusive list.

<sup>16</sup>Examples of drugs which are sometimes inappropriately prescribed and administered are: Thorazine, Haldol, Valium, Librium, Lithium, Stelazine, Sinequan, Mellaril, Miltown and Serentil.

occurrence at a specific time. The time between the negligent behavior and the appearance of the full-blown injury is minimum. In contrast, in the case of a progressive injury such as a decubitus ulcer, the wound gradually evolves, and cannot be pinned down to a specific time.

In the former, the defense often asserts that the resident was psychologically dysfunctional to the point that he/she was impossible to monitor and control. Defense example:

Patient John Doe was out of sight of nursing personnel for a mere 15 minutes, and subsequently was discovered floating face-down in the whirlpool bath. Defendant contends that it cannot assign a staff member to monitor each and every resident every second of the day. Consequently, the injury was not the fault of the nursing home staff, but rather resulted from the resident's unfortunate mental condition. John Doe was simply a time bomb waiting to go off.

In the latter progressive injury case, the defense often asserts that the complex medical history of the elderly resident, coupled with his/her age and deteriorating health status, was the true cause of the injury in question. The defense seizes upon the frail physical condition of the resident (as opposed to the mental condition), arguing that such condition preordained the occurrence, e.g. the Stage IV sore(s).

Thus the distinction between injuries identified hereinbelow from those contained in *[C] -- the progressive failure injury* -- stems not only from the the amount of time between the negligent behavior and the presence of the full-blown injury, but also the excuse typically offered by the defense to explain away liability.

Nursing home injuries precipitated by untoward incidents which are frequently the subject of litigation are as follows:

- o Strangulation (e.g., strangulation resulting from the failure to either monitor restraints or the improper use or application of restraints such as posey restraints)
- o Drowning
- o Scalding
- o "Wander-off" cases, wherein death or serious injury occurs after the resident has wandered away from the facility

- o Falls and fractures resulting from the failure of nursing home staff to follow accepted protocols and implement necessary preventive measures<sup>17</sup>
- o Rape and/or sexual assault
- o Physical abuse and assault resulting in wounds, bruising or disfigurement<sup>18</sup>

#### **§1.04 Key Damage Elements and Appraisal Questions**

To restate the obvious, the damage elements which in large degree make up the bulk of the verdict in a significant personal injury case seldom contribute to the award for damages in a nursing home maltreatment case. Rare indeed, is the nursing home case where damages of a meaningful nature are recovered on the basis of future harm and pecuniary detriments occurring over the remainder of the resident's life.<sup>19</sup> Even more rare is the case where plaintiff resident has the capacity to generate earnings subsequent to admission to defendant facility. And of course, the most unusual case of all is one factually capable of supporting claims for both future medicals and lost income.

Less than one-half of the twenty-nine damage elements presently recognized in most jurisdictions as being applicable to either a personal injury case, survival action or wrongful death action are *realistically* available to the nursing home resident injured as a result of the wrongful conduct of a long term care institution. [See below checklist.]

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<sup>17</sup>The occurrence of a fracture and subsequent failure to timely assess and recognize it may give rise to a *progressive failure* injury such as the case where patient Doe falls, sustains a fracture therefrom but is not X-rayed nor treated for the fracture, despite the presence of classic symptoms for eight days suggesting the occurrence of the same.

<sup>18</sup>It should be noted that the occurrence of one or more of the injuries contained in the above checklist does not absolutely guarantee the existence of a solid causal link. Counsel must not fail to factor into the evaluation the pre-existing condition defenses discussed below in Section 1.04C.

<sup>19</sup>The disease process and other debilitating factors underlying the condition of the nursing home residents, coupled with documentation in the patients nursing home chart stating "provide comfort as she prepares for death" or "unable to rehabilitate" severely weakens the probative value of any life expectancy estimate necessary to compute future damages.

*See*. BANDAZIAN V. CONVALESCENT SERVICES, INC., Richmond Circuit Court (VA) No. LJ742, where plaintiff, a 39-year-old brain-damaged man, received \$802,000 after sustaining a broken leg (fall from bed). The settlement was designed to offset cost of full-time nursing care in the future.

## CHECKLIST OF DAMAGE ELEMENTS:<sup>20</sup>

### A. Personal Injury or Survival Action<sup>21</sup>

- o Lost Earnings
- o Lost Earnings Capacity
- o Past Loss of Value of Household Services
- o Future Loss of Value of Household Services
- ox Past Medical Expenses
- o Future Medical Expenses
- ox Past Physical Pain and Suffering
- o Future Physical Pain and Suffering
- ox Past Mental Anguish
- o Future Mental Anguish
- ox Past Disfigurement/Embarrassment
- o Future Disfigurement/Embarrassment
- ox Past Physical Impairment
- o Future Physical Impairment
- o Past Loss of Consortium
- o Future Loss of Consortium
- ox Loss of Mental or Intellectual Function<sup>22</sup>
- o Bystander Mental Anguish for Personal Injury and Death
- ox Punitive/Exemplary
- o Property Damages/Cost of Repairs

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<sup>20</sup>Generally, the elements listed herein contain a reference to "past" or "future" detriment. "Past" damage connotes the pre-trial timeframe which runs from the occurrence of the event made the basis of the lawsuit until the trial date. "Future" damage refers to the post-trial timeframe, which runs from the date of verdict to a future point in time. The maximum length of the future time frame is a function of the life expectancy of the victim.

<sup>21</sup>In a personal injury action, the injured nursing home resident may potentially recover all damages set forth hereinbelow except bystander damages which are awarded to a bystander as a consequence of the emotional trauma suffered from viewing the incident. In a survival action, the action arising out of a personal injury to the victim survives for the benefit of the estate. The estate may seek recovery for all damages hereinbelow set forth with the exception of: 1) bystander damages; and 2) in some jurisdictions punitive and damages for mental anguish. See generally, 1 AM JUR. 2D *Abatement, Survival, and Revival* .

<sup>22</sup>In a case where plaintiff sustains brain damage which gives rise to the question of whether plaintiff could perceive pain and experience mental anguish, several courts have held that the loss of mental and intellectual function which precludes such "appreciation" is itself a separate element of damages. See, for example, WESTERN UNION TELEGRAPH CO. v. TWEED, 138 S.W.2d 1155, 1156, (Tex. Civ. App. - Dallas, 1911) rev'd on other grounds, 166 S.W.2d 696 (Texas 1914).

- o WRONGFUL DEATH ACTION<sup>23</sup>
- o Loss of care, support, services and contributions having a pecuniary value that would, in reasonable probability, have been provided by the deceased in the past.
- o Loss of care, support, services and contributions having a pecuniary value that would, in reasonable probability, have been provided by the deceased in the future.
- ox Loss of love, affection, solace, comfort, companionship and society suffered in the past by surviving spouse or child.
- ox Loss of love, affection, solace, comfort, companionship and society to have been expected in the future by surviving spouse or child.
- ox Past mental anguish suffered by surviving spouse or child as a result of the death.
- ox Future mental anguish suffered by surviving spouse or child as a result of the death.
- o Loss of inheritance: the amount that probably would have been added to the estate and probably left to spouse or child.
- ox Funeral expense.
- o Property Damage/Cost of Repair.

Those items checked above represent the relatively small subset of damages which are *commonly* recoverable<sup>24</sup> in an action arising out of personal injury or death of a nursing home resident. As a practical matter, however, only five of the twelve designated elements consistently bear substantial economic fruit: 1) claims for punitive damages; 2) claims for past mental anguish; 3) claims for past pain and suffering;

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<sup>23</sup>The items set forth hereinbelow constitute damages recoverable by the surviving spouse or descendant children under a wrongful death action. See generally, Sty, *Damages and Recovery*, §263-264; Smedley, *Order Out of Chaos in Wrongful Death Law*, 37 VAND. L. REV. 273; *Wrongful Death*, 22A AM JUR. 2D §1-542(1988).

Note that in addition to the above elements of recovery, punitive damages are recoverable in wrongful death actions in the following states: Alabama, Arizona, Arkansas, Florida, Idaho, Iowa, Kentucky, Massachusetts, Mississippi, Missouri, Montana, Nevada, New Mexico, New York, North Carolina, Oklahoma, Oregon, South Carolina, Tennessee, Texas, West Virginia, and Wyoming. See Ghiardi and Kircher, *PUNITIVE DAMAGES L. P. PRAC.* §5.19.

<sup>24</sup>Certain other damage elements may be available, depending on the facts of the case. This subset is intended to represent only those elements most frequently associated with substantial recovery by plaintiff against the long-term care facility.

4) claims for past loss of love, affection, solace and companionship<sup>25</sup> on the part of statutory beneficiary of decedent resident; and 5) past medical expenses.

Due to the fact that the relationship between the deceased resident and the statutory beneficiaries is often at best tenuous, claims by the relatives of a nursing home victim for mental anguish and loss of society are frequently rendered suspect and inconsequential. Predictably, juries look with disdain on the claims of relatives who, for whatever reason, rarely visit the deceased.<sup>26</sup> Although there are exceptions to this general rule, such as the devoted wife or daughter who regularly attended to needs of a loved one in the convalescent facility,<sup>27</sup> attorney for plaintiff must be extremely cautious in projecting the damages that realistically are recoverable by reason of the emotional trauma inflicted upon beneficiaries of the deceased resident.

Furthermore, litigators must be cognizant of the fact that medical expenses subsequently occasioned by the wrongful conduct of the nursing home are often limited in scope. The failure of the nursing home to transfer an injured resident in need of medical attention to a hospital, coupled with the relatively short life expectancy of said resident frequently restrict the quantum of medical expenses.

As a consequence of these limitations, potential nursing home litigators should approach the issue of damage appraisal with the general view that claims<sup>28</sup> for punitive

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<sup>25</sup>In a case where the life expectancy of the nursing home victim prior to the injury made the basis of the lawsuit is more than a few years, the damage elements consistently bearing economic fruit are expanded to include compensation for future losses and emotional and economic detriments.

<sup>26</sup>McMath, *The Nursing Home Maltreatment Case*, 21 TRIAL 52, (September 1985).

<sup>27</sup>See *F. CAMPBELL V. PAYTON HEALTH CARE FACILITIES*, Polk County Circuit Court, Florida, No. GCG-84,1170, (where jury awarded \$500,000 for mental anguish suffered by wife of decedent in wrongful death action; and *DSF, INC., V. MARY SUE SAGER*, Los Angeles County Superior Court, California, Dept. No. 31, No. C449288, January 27, 1988 (where jury in a wrongful death action awarded daughter of decedent \$185,000 for loss of her father's love, comfort, companionship, society and moral support and \$5,800 for emotional distress resulting from her contemporaneous observations of defendant's negligent conduct.)

<sup>28</sup>For reasons discussed above, claims brought by the injured resident or on behalf of said resident's estate are sometimes favored over wrongful death actions where statutory beneficiaries of decedent rarely visited decedent at the convalescent facility. See McMath, *The Nursing Home Maltreatment Case*, 21 TRIAL 52, (September 1985).

However, as stated previously, n. 17, in appraising the potential damages, counsel should be mindful that a close relationship between the decedent and the beneficiary may give rise to substantial damages for mental anguish and loss of familial relationship suffered by said beneficiary.

damages, mental anguish,<sup>29</sup> and pain and suffering represent the center of gravity of the case. Although other specific damages<sup>30</sup> may be available to plaintiff, in most cases, the final award will hinge upon this small core of elements. Accordingly, it follows that the key questions confronting one who seeks to determine the quantitative value of a nursing home maltreatment case are:

1. Based on the underlying facts, what is the probability that a jury will award punitive damages?
2. What sum of money is a jury likely to award to plaintiff resident against defendant nursing home as punitive damages?
3. Based on the underlying facts, what is the probability that a jury will award damages for the damages listed below?
  - (a) Physical pain and suffering of the resident?
  - (b) Mental anguish of the resident?<sup>31</sup>
4. What sum of money is a jury likely to award to plaintiff resident as fair and reasonable compensation for:
  - (a) Pain and suffering of the resident?
  - (b) Mental anguish of the resident?<sup>32</sup>
5. Based on the underlying facts, what is the probability that a jury will award damages arising out of the wrongful death of the resident for elements listed below:
  - (a) Loss of love, companionship, comfort, society and moral support suffered by statutory beneficiary?
  - (b) Mental anguish suffered by statutory beneficiary?
6. What sum of money is a jury likely to award to the statutory beneficiary as fair and reasonable compensation for his/her:
  - (a) Loss of love, companionship, comfort, society and moral support suffered by statutory beneficiary?
  - (b) Mental anguish suffered by statutory beneficiary?

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<sup>29</sup>For reasons discussed above, claims for mental anguish, pain and suffering by the resident are generally better received than those claims by relatives or beneficiaries for mental anguish.

<sup>30</sup>The elements of damages available to plaintiff are always a function of the underlying facts.

<sup>31</sup>Of course, if factually applicable, a third element should be included -- "(c) Medical Expenses."

<sup>32</sup>Ibid.

## **§1.05 Comparable Verdicts and Settlements**

After having established the various elements of damages applicable in a nursing home maltreatment case, it is necessary to consider the amount of damages that can reasonably be expected for the type of injury suffered by the resident. One proven and frequently employed method in personal injury litigation for predicting the amount of damages a jury will likely award involves the use of comparable verdicts. By collecting and analyzing the damage awards rendered in comparable cases, i.e., cases where the injuries and facts giving rise thereto are similar in nature, litigators can substantially enhance their ability to calculate the probable verdict size. It has been shown through comprehensive studies that verdicts in personal injury cases generally follow patterns. Presented with similar injuries and supporting facts, juries tend to render remarkably consistent awards; significant deviations are infrequent, and for actuarial purposes, verdicts that deviate upward from the pattern tend to offset those that deviate downward.<sup>33</sup> There is no reason to believe that this tendency would be less pronounced in causes of action arising out of the neglect of a nursing home resident.<sup>34</sup> Accordingly, the verdict size in factually similar nursing home cases would appear to constitute a valuable yardstick for measuring the level of damages reasonably recoverable. Due to the limited amount of verdict data currently available in nursing home cases, it is readily conceded that the verdicts and settlements discussed below will not support defensible statistical conclusions or actuarial inferences. Nonetheless, the reaction of both juries and insurance carriers to these distinguishable fact patterns provides the lawyer not only with an important indice for appraising the significance of a set of facts, but also a starting point for quantitatively assessing the value of a case.

Two final points should be made prior to embarking upon an examination of recent nursing home verdicts and settlements: First, a comparison between earlier verdicts, handed down in the late seventies (1970s) and those handed down in the mid-eighties (1980s) suggests that the value of the nursing home case has escalated dramatically. In light of this trend, a comparison to earlier verdicts may not be a reliable measure of present verdict expectancy. Secondly, it is important for counsel to realize that even if there is a very close similarity of facts and circumstances bearing upon the amount of damages, no case is an exact and binding precedent for another. The case profiles set forth below are only benchmarks for evaluation. They do not constitute controlling criteria, but rather represent strong analogies and points of reference. **[See Table 1]**

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<sup>33</sup>6 AM JUR. TRIALS 984 citing *Liability Recovery Probabilities, Personal Injury Evaluation Handbook*, Jury Verdict Research Inc., (Cleveland, Ohio) v. 3, page 355.

<sup>34</sup>The applicability of this hypothesis is restricted in jurisdictions where: 1) punitive damages are not recoverable in wrongful death/survival actions; and 2) damages for pain and suffering/mental anguish are either capped by statute or limited by a ratio based upon the amount of pecuniary losses.

## § 1.06 -- Causes of Action

### [A] Negligence

The most common basis for imposing liability on a nursing home for the injury of its resident is the common law concept of negligence. Although a facility may be held liable under a variety of other theories,<sup>35</sup> negligence serves as the primary cause of action for plaintiffs in the majority of cases yielding large damage awards or settlements. To recover under this theory, plaintiff must establish: 1) that the nursing home and its employees were legally obligated to conform to a certain standard of conduct in caring for residents; 2) the applicable standard of conduct and its breach; 3) actual injury to the plaintiff; and 4) a causal connection between the breached standard of care and the complained-of harm.

#### 1. FACT ISSUES

Under a theory of common law negligence, the critical issues for case appraisal purposes are as follows:

- a. Did the nursing home fail to use ordinary care in providing for the needs of plaintiff/resident; that is, did it fail to do that which a nursing home of ordinary prudence would have done under the same or similar circumstances, or did it do that which a nursing home of ordinary prudence would not have done under the same or similar circumstances?
- b. Was such negligence the proximate cause of the occurrence in question?

More specifically, the attorney must determine if: 1) the negligent conduct of the nursing home produced the complained-of event in a natural and continuous sequence, and without such conduct, such event would not have occurred; and 2) the act or omission complained of must be such that a nursing home exercising ordinary care would have foreseen that the event or some similar event might reasonably result therefrom. As is true in any case founded in negligence, the pivotal issue in a nursing home neglect case is the applicable standard of care by which the facility's conduct is to be measured. The law requires a nursing home to exercise that degree of skill and care which is expected of a reasonably competent nursing home in the same or similar

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<sup>35</sup>See Neemore, *Applying Racketeering Laws to Nursing Homes*, 19 Clearinghouse Rev. 1306 (March, 1986); Johnson, Terry and Wolff, *Nursing Homes and the Law: State Regulation and Private Litigation*, §3-4, (Breach of Contract), and §3-9, (Assault and Battery); Neemore and Horvath, *Nursing Home Abuses as Unfair Trade Practices*, 20 Clearinghouse Rev. 801, (November 1986)

circumstances.<sup>36</sup> In other words, a nursing home must provide reasonably competent health care to its patients.

## 2. VICARIOUS AND DIRECT CORPORATE LIABILITY FOR NEGLIGENCE

Generally speaking, the responsibility for a resident's injury or death arising out of the negligent conduct of an agent may be ascribed to the corporate nursing home owner or operator by way of two distinct but overlapping theories: 1) direct corporate liability; and 2) vicarious liability. Direct corporate nursing home liability is predicated on the idea that the long term care facility, as a separate entity, owes a direct non-delegable duty of care to its residents. If a breach of this duty proximately causes a patient's injury, the facility will be held directly liable, even though an employee within the facility's purview caused the actual injury.<sup>37</sup> At its most fundamental level, imposition of direct corporate nursing home liability depends upon two interrelated prerequisites: 1) definition of the duty owed by the facility to the patient; and 2) determination of the forms of evidence acceptable to define that duty.<sup>38</sup> Vicarious liability, on the other hand, does not presuppose that the nursing home owes its resident any independent duty of care. Under this theory, the facility may be held liable for injuries that others cause if a certain relationship is established between the institution and the person whose negligence proximately caused the injury. The threshold question under this theory revolves around 1) the duty owed by the person whose substandard conduct caused the injury; and 2) such person's relationship to the facility.<sup>39</sup>

As a practical matter, the distinction between these two theories becomes blurred when plaintiff, as a part of his cause of action, draws a connection between the resultant harm and the failures of administrative personnel of the corporate entity and the high managerial agents to adequately discharge their supervisory responsibility (e.g., the failure of the Director of Nurses to adequately monitor nurses and nurse assistants; enforce patient care policies; and assure that sufficient nursing care was provided in quantity and amount to meet the needs of patients).

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<sup>36</sup>Alexander's Jury Instructions on Medical Issues (2nd ed.) INST8-1, 8-2, and 8-3; *May v. Triple C Convalescent Centers*, 19 WA App 794, 578 p. 2nd 541.

<sup>37</sup>Hacker, *Expansion of Health Care Provider's Liability: An Application of Darling to Long-Term Care Facilities* 9 Connecticut Law Review, 462 (1977); Johnson, Terry and Wolff, *Nursing Homes and the Law*, Section 3-18 (Corporate Liability); *Stogsdill v. Manor Convalescent Home, Inc.*, 35 Ill App 3d 634, 343 NE 2d 589, (1976); *Capital City Manor, Inc. v. Culberson*, 613 S. W. 2d 835 (Ark. Ct. App - 1981).

<sup>38</sup>Purdue, *The Law of Texas Medical Malpractice*. 22 Hous.L.Rev.1, 280 (2nd ed., 1985) at pages 10-12 and 80.

<sup>39</sup>*Id.* at p. 154.

### 3. CHECKLIST OF MINISTERIAL OMISSIONS

The following ministerial omissions may serve as the basis for imposing liability on the corporate nursing home for negligence, regardless of whether the concept of direct corporate liability or the more prevalent theory of vicarious responsibility is employed.

- o Failure to provide sufficient numbers of licensed nurses to meet the minimum requirement for licensed nurses established by law.
- o The failure to provide nurses and nurse's assistants sufficient in number to provide 24-hour nursing service to the residents so as to assure that said resident received treatment, medication and diet as prescribed by his or her attending physician.
- o Failure to provide nurses and nurse's assistants sufficient in number to provide proper care to said resident so as to keep him/her clean and comfortable and to prevent the formation of decubitus ulcers, lesions and sores on the body of said resident.
- o The failure to provide sufficient non-attendant personnel, to wit: laundry personnel on duty to keep an adequate supply of clean linens for the care of said residents.
- o Failure to provide 24-hour nursing service seven days a week, adequate in quality and amount, to assure that the resident receives, in accordance with the mandate set forth in federal law, state law, and the nursing home policy and procedure manual, the following care:
  - o Adequate water, fluids, nutrition and therapeutic diet.
  - o Adequate skin care, turning and repositioning so as to prevent the formation of decubitus ulcers, lesions and sores on the body of said resident.
  - o Adequate sanitary care, cleansing after each incontinent episode and changing of said resident's bed linen as needed so as to prevent urine and fecal contact with his or her skin for unsafe periods of time.
  - o Adequate examination and assessment by nursing home personnel for skin breaks and decubiti so as to timely and adequately intervene in order to prevent the formation of ulcerated, pus-

infiltrated, festering and necrotic lesions on the body of said resident.

- o Adequate examination and assessment by nursing home personnel of decubitus and open sores so as to timely and adequately intervene to prevent the systemic invasion of bacteria into the bloodstream of said resident.
- o Adequate nursing care for decubitus after development.
- o Observation and examination of the responses, systems and progress of the physical condition of said resident.
- o Notification of the attending physician of said resident of significant changes concerning resident's physical condition and concerning persistent unresolved problems relating to the care and physical condition of said resident.
- o Adequate and sanitary catheter care so as to prevent urinary tract infections.
- o Timely and adequate nursing intervention to alleviate pain and suffering of the resident.
- o Timely and adequate nursing intervention to alleviate edema, swelling and accumulation of excessive fluids developed by the resident.
- o Adequately trained and qualified nurses and nurses assistants to administer to the nursing needs of said resident and to protect said resident from injury.
- o Objective evaluation by nursing home personnel of the health status of said resident by frequent monitoring of temperature, pulse, respiration, blood pressure and weight.
- o Objective evaluation of the health status of said resident through acquisition and submission of laboratory specimens obtained from said resident as ordered by his or her attending physician.
- o Nursing plan of care as required by state and federal law, based on the needs of said resident at the time of admission to the facility.
- o Nursing plan of care revisions and modifications as the need of said resident changed.

- o The failure to provide sufficient quantities and quality of food, nutrition, medications, nursing supplies, linen, bandages, catheters, catheter irrigation supplies, heat lamps, egg crate mattresses, sheep skins, soap and rubber gloves to enable the nursing home staff to assure that the needs of said resident were met.
- o The failure to adequately assess, evaluate, and supervise registered nurses, licensed vocational nurses, nurse assistants, medications assistants, dietary personnel or laundry personnel in said facility so as to assure that said resident received care in accordance with the nursing home's policy and procedure manual and state and federal law.
- o The failure of high managerial agents and corporate officials to adequately assess, evaluate and supervise the administrator and director of the nursing home and the director of the nursing home so as to assure that the resident received care in accordance with the nursing home's policy and procedure manual and state and federal law.
- o The failure of high managerial agents and corporate officials, including the administrator and director of nurses, after receiving notice that patients accepted for care in the nursing home were not receiving needed care in accordance with the nursing home's policy and procedure manual and state and federal law, failed to recommend direct action and implement strategy designed to correct known deficiencies and prevent their future occurrence.
- o Failure to report and document, in said resident's medical record, the resident's symptoms, responses and progress.
- o Failure to affect the transfer of said resident to a hospital when said resident developed symptoms, conditions and illnesses beyond the treatment capabilities of the nursing home.
- o Failing to report, as required by state law, that residents at the facility had been abused and neglected prior to and during plaintiff's residency.

**[B] Negligence Per Se**

The unexcused violation of a legislative enactment or an administrative regulation, which is designed to prevent injury to a class of persons to which the injured party belongs, is negligence per se<sup>40</sup>.

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<sup>40</sup>DUSINE V. GOLDEN SHORES CONVALESCENT CENTER, INC., 249 SO.2D 40 (FLA. APP. -- 1971).

Under the doctrine of negligence per se, courts use a statute, ordinance or regulation as a legislatively-mandated standard of conduct; that is, as a definition of what a reasonably prudent person would do in a particular situation. If a legislative pronouncement covers the fact situation of a case, the trier of fact is not asked to judge whether the defendant acted as a reasonable and prudent person acted under the same or similar circumstances. Instead, the legislature is deemed to have prescribed, as a matter of law, what a reasonably prudent person would have done. Unless the defendant proves some legally recognizable excuse, the only inquiry for the trier of fact is whether the defendant violated the statute, ordinance, or regulation and whether this violation was the proximate cause of the accident.<sup>41</sup>

In the wake of persistent quality of care problems for the last three decades in America's long term care facilities, federal and state governments have created a myriad of regulations and statutory duties governing the care provided to residents in long term care facilities. These regulations are designed to assure that patients receive safe and adequate care. Failure on the part of the nursing home to conform to such legislative and administrative standards subjects the non-compliant facility to a variety of regulatory sanctions, including: 1) loss of license to operate; 2) loss of federal and state Medicaid revenues; 3) loss of right to participate as a provider in the Medicaid program; and 4) fines for violation of regulations. Without question, these statutes and regulations are designed to protect a class of persons, of which the resident is a member, from the type of injury or hazard created by the violation of such statute or regulation. Accordingly, liability in a nursing home case may be predicated upon a finding, by the trier of fact, that defendant nursing home violated a state or federal long term care regulation or statute.<sup>42</sup> Rather than quibbling over the appropriate standard of care by which to judge defendant's conduct, plaintiff is entitled to frame the charge submitted to the trier of fact in terms of whether the defendant nursing home failed to comply with the applicable rules and regulations.

With respect to this theory, two additional points should be noted. First, although violation of a standard of care borrowed from a legislative enactment is negligence per se, the converse is not necessarily true. The fact that a statute was complied with is not an absolute defense to an ordinary negligence action<sup>43</sup>. Compliance with a statute does not prove a lack of negligence.

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<sup>41</sup>Edgar and Sales, *Torts and Remedies*, Section 1.05 (Negligence Per Se) (Supp 1988).

<sup>42</sup>DUSINE V. GOLDEN SHORES CONVALESCENT CENTER, INC., 249 So2d 40 (Fla. App-1971).

<sup>43</sup>see GOLDEN VILLA NURSING HOME, INC. vs. SMITH, 674 S.W.2d 343, 348-349 (Tex. App. -- Houston [14th Dist.], 1984, ref. n.r.e.)

A statutory provision or regulation is usually considered a minimum standard, and tort law may impose a higher standard under some circumstances. For example, a nursing home was sued for allowing an elderly patient to wander onto the highway and cause an accident in which both the patient and a motorist were injured. The nursing home attempted to argue that its conduct was not negligent because it complied with the Texas Department of Health's minimum licensing standards for nursing homes. The court ruled that compliance with such regulations was irrelevant, and that excluding the regulations from evidence would be, at most, a harmless error. Compliance with such regulations would not have precluded a finding of negligence.<sup>44</sup>

Secondly, long before plaintiff's attorney first interviews his or her client in a nursing home case, substantial evidence of statutory and regulatory violations may have already been documented in the form of investigative and surveillance reports by state and/or federal nursing home inspectors. Characteristically, such findings form an integral part of a significant nursing home maltreatment case.

### **[C] New Theories of Recovery**

Commonly, the defense in the nursing home maltreatment case is founded upon the hypothesis that any harm or injury complained of was the inevitable result of the resident's deteriorating condition and a natural and unpreventable part of the dying process. As a consequence thereof, plaintiff is forced, as part of its case, to unravel the harm caused by neglect from that caused by the underlying disease processes (present at the time the plaintiff resident was admitted to defendant nursing home). Many practitioners are reluctant to shoulder such a burden, even in cases where considerable evidence of substandard care exists. Fearing that defendant can produce more expert testimony from more credible sources than plaintiff, potential actions are regularly rejected on the basis that the nursing home victim is without a viable theory of recovery that will yield damages substantial enough to compensate the lawyer for his time and resource investment.

Currently, the aforementioned rationalization for rejecting a potential case is being eroded by new remedies afforded to plaintiff under a theory of: 1) violation of unfair and deceptive trade practices act, and 2) tort or breach of good faith and faith dealing duty occasioned by the contractual relationship between plaintiff as a Medicaid recipient and defendant as a Medicaid provider.<sup>45</sup>

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<sup>44</sup>see *GOLDEN VILLA NURSING HOME, INC. v. SMITH*, 674 S.W.2d 343, 348-349 (Tex. App. - Houston [14th Dist], 1984, ref. n.r.e.)

<sup>45</sup>Such theory is also applicable in a case where plaintiff is a private-pay patient.

These relatively new and evolving theories permit plaintiff to recover for mental anguish, pain and suffering upon a showing that defendant's statutory violation or breach of good faith and fair dealing duty proximately caused (or were the producing cause) of the foregoing conditions. In addition thereto, under an action based on the deceptive, false and misleading practices of defendant nursing home, plaintiff may recover attorney's fees from defendant if he or she prevails. Furthermore, upon showing that defendant's acts or omissions were the result of a conscious indifference to the rights or welfare of the nursing home resident, or was knowingly committed (under the unfair deceptive trade practice statutes), plaintiff may recover punitive damages.

These theories and their respective benefits are generally discussed below.

## 1. DECEPTIVE TRADE PRACTICE

In addition to common law negligence as a theory of recovery, plaintiff also might consider an alternative cause of action based on the nursing home's false, misleading and deceptive representations as to the quality of care and services provided by said facilities. Since the late 1970s, several state attorneys general have successfully used unfair and deceptive trade practices or consumer protection laws to enjoin a variety of nursing home practices. Such practices as providing substandard care and abusing residents<sup>46</sup> have been the subject of these cases. The emergence of this species of enforcement litigation, coupled with the development of a general body of unfair and deceptive acts and practices (UDAP) law, provides theories and rationales for private litigants to apply to nursing home practices. Presently, in most jurisdictions, a variety of UDAP statutes offer consumers protection in connection with transactions involving goods or services.<sup>47</sup> These statutes generally prohibit conduct that is deceptive, and the deception standard is much broader than that required for common law fraud. Often the "tendency to deceive" is sufficient to meet the statutory prohibition.

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<sup>46</sup>For an excellent source manual, see *Unfair and Deceptive Acts and Practices* Cumulative Supplement 1988, National Consumer Law Center, 11 Beacon Street, Boston Massachusetts, 02108.

*Belmont Laboratories v. FTC*, 103 F.2d 538 (3rd Cir 1939; *Commonwealth v. Hush-Tarc Industries, Inc.*, No. 305 CD.1970, Clearinghouse No. 26025 P.A. Commu. Ct. Dec. 22, 1971; (concerning the credulousness of sufferers of disease).

<sup>47</sup>Nursing home residents and their families, due to the resident's physical or mental condition, his or her frailty and the general stressfulness of the nursing home placement process on all family members, should be considered such vulnerable consumers.

While many statutes enumerate specific proscribed activities, almost all also contain more general prohibitions against deceptive, unfair or unconscionable acts.<sup>48</sup> It is this general language that may provide a cause of action for nursing home residents.<sup>49</sup>

Evidence of document falsification and misleading advertisements are commonly present in nursing home cases that produce large settlements or verdicts. Indeed proof that the quantity of care services charted in patients' nursing home records were over-represented and that the resultant clinical conditions were under-represented is often essential to establishing liability under a theory of negligence. When the blanks in the nursing home treatment record have been routinely and blindly filled in by nursing home employees without regard to the actual provision of services to patients, the success of plaintiff's lawsuit often hinges upon the advocates ability to destroy the credibility of the nursing home record and the representations contained therein.

If successful in their task, the potential of not only imposing liability upon defendant nursing home but also obtaining a sizeable recovery increases dramatically. When proof of these false and misleading representations is contrasted against a background of lofty and inflated claims by the facility of "high-quality care rendered by experienced professionals" (as typically found in the yellow pages advertisements; nursing home brochures; certifications made by the facility as a condition for Medicaid payment; patient bill of rights; billboards and radio spots) a formidable case is presented.

The aggravated and inflationary nature of these misrepresentations is potentially so strong that plaintiff may be in a position to obtain a substantial recovery under a deceptive practice theory, even if unable to establish the causal connection between the nursing home's failures and the resident's severe injury or death required in a negligence action. Under the former theory, the inability of plaintiff to link the deceptive acts of defendant to a personal injury or death would not serve as a legal or factual bar to the recovery of actual damages, based upon plaintiff's lost benefit of the bargain, mental anguish, pain or suffering or punitive damages arising out of the conscious indifference of defendant.

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<sup>48</sup>Neemore and Horvath, *Nursing Home Abuse as Unfair Trade Practices*, 20 Clearinghouse Review (November 1986).

<sup>49</sup>Unfair and Deceptive Acts and Practices statutes are generally subject to liberal interpretations as remedial legislation, and practices that may otherwise be lawful are scrutinized more closely when used on especially vulnerable consumers.

## 2. TORT LIABILITY FOR BREACH OF A GOOD FAITH AND FAIR DEALING DUTY

Typically, the admission to a nursing home of a patient eligible for Medicaid benefits is occasioned by creation of two contracts: 1) a contract between the resident and the facility wherein the resident agrees to pay on a monthly basis his or her social security income<sup>50</sup> to the facility in return for shelter and care; and 2) a contract between the facility and the state Medicaid agency wherein the facility agrees to provide care to said resident in accordance with specific standards prescribed by federal and state laws in return for a Medicaid reimbursement.<sup>51</sup> Under the latter agreement, the resident becomes a third party beneficiary of obligations and covenants flowing between the facility and the state Medicaid agency.

From these contractual relationships grows an implied duty of good faith and fair dealing owed by the nursing home to residents in connection with the provision of care. Conceptually, this duty is quite simple. It requires: 1) diligent performance by the facility of its service obligation under the contract, consistent with the justified expectations of residents and the state Medicaid agency;<sup>52</sup> 2) faithfulness to the agreed common purpose of the contract;<sup>53</sup> or 3) that the nursing home not impair the rights of residents to receive the benefits of the agreement.<sup>54</sup>

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<sup>50</sup>Generally, the agreement obligates resident to pay to the facility all but \$25.00 of his or her monthly social security checks.

<sup>51</sup>Although each state administers the Medicaid program, both the state and federal government contribute dollars under the Medicaid assistance acts. These obligations and covenants emanate from a provider contract executed by the state and facility at the time said facility was certified to participate as a provider in the Medicaid program. Such contract which pertains to the future performance of services is renewed on an annual basis and is applicable to all Medicaid recipients cared for at the nursing home. As a consequence, the obligations contained therein cover every Medicaid recipient admitted to the facility after date of execution.

<sup>52</sup>Restatement (Second) of Contracts §205 (1979).

<sup>53</sup>Id.

<sup>54</sup>Comment, A New Tort for Texas: Breach of the Duty of Good Faith and Fair Dealing 18 St. Mary's L.J. 1295, 1304-1305 (1987). See Generally Burton, Breach of Contract and the Common Law Duty to Perform in Good Faith, 94 Harv. L. Rev. 369, 370-71 (1980) (concept of good faith is license for judicial intervention to protect reasonable expectations of parties); Summers, The General Duty of Good Faith -- Its Recognition and Conceptualization, 67 Cornell L. Rev. 810, 812 (1982) (good faith concept is tool to redeem bad faith not remedied under traditional contract theory; Burton More on Good Faith Performance Contracts; A Reply to Professor Summers, 69 Iowa L. Rev., 497, 502 (1984).

The breach of this duty may serve as the basis for improving liability sounding not only in contract but, more importantly, in tort.<sup>55</sup> Under the latter doctrine, the duty of good faith and fair dealing is seen as unconditional and independent of the contractual obligations. Therefore, a breach of such duty gives rise to an independent action in tort<sup>56</sup> which subjects the offending party to the full spectrum of tort damages, including exemplary damages and damages for mental anguish.

A major stumbling block in understanding the case law on the duty or covenant of good faith and fair dealing is determining whether the court is referring to an implied covenant in contract or a tort duty implied by law. Presumably, remedies in the first situation would be limited to contract damages, while the second could give rise to tort liability, including punitive damages. Unfortunately, the courts have not made their holdings on this subject very clear. In *Commune v. Traders & General Insurance Co.*, 50 Cal. 2d 654, 328 P.2d 198 (1958), one of the seminal cases in the area of good faith and fair dealing in California, the court stated: "There is an implied covenant of good faith and fair dealing in every contract...." It is apparent from language in the opinion, however, that the court did not view the insurance company's conduct as a breach of a contractual obligation, but rather as a breach of a duty in tort. Other courts have referred to a breach of the duty as a "tortious breach of contract." The Supreme Court of Wisconsin addressed this misnomer in *Anders v. Continental Insurance Co.*, 85 Wis. 2d 675, 271 NW2d 368 (1978):

"While that term may be a convenient shorthand method of denominating the intentional conduct of a contracting party when it acts in bad faith to avoid its contract obligations, it is confusing and inappropriate because it could lead one to believe that the wrong done is the breach of the contract. It obscures the fact that bad faith conduct by one party to a contract toward another is a tort separate and apart

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<sup>55</sup>See generally, Comment, Tort Remedies for Breach of Contract: The Expansion of Tortious Breach of the Implied Covenant of Good Faith and Fair Dealing into the Commercial Realm, 86 Colum. L. Rev. 377, 380 (1986) (good faith and fair dealing covenant has introduced a modicum of morality into contract law); Note, Extending the Bad Faith Tort Doctrine to General Commercial Contracts, 65 B.U.L. Rev. 355 (1985); Comment, A New Tort for Texas: Breach of the Duty of Good Faith and Fair Dealing, 18 St. Mary L.J. 1295.

<sup>56</sup>The many states that have adopted a cause of action in tort for bad faith breach of duty arising out of a court's actual relationship have established standards that are sui generis to their own situations. Some common elements, however, do transcend the geopolitical differences. First, plaintiff would need to establish the duty arising out of the contractual relationship, whether the connection be direct or as a third-party beneficiary. Second, he or she would have to show an absence of a reasonable basis for failing to faithfully provide the justifiably expected services. Implicit in any standard would be a showing of the defendant's conscious indifference to the rights and welfare of individuals to whom defendant was obligated. Finally, any test would need as its basis an objective standard for review. *Anderson v. Continental Ins. Co.*, 82 Wis.2d 675, 271 NW2d 368 (1978); *Massey v. Armco Steel Co.* 635 S.W.2d 596 (Tex. Civ App. 14 Dist -- 1982)

from a breach of contract per se and it fails to emphasize the fact that separate damages may be recovered for the tort and contract breach."<sup>57</sup>

Regardless of the language used or the jurisdiction involved, most discussions of the duty of good faith and fair dealing appear to assume that the duty is one in tort when a "special relationship" exists between the parties. See *Aetna Casualty & Surety Co. v. Broadway Arms Corp.*, 664 S.W.2d 463 (Ark. 1984); *National Savings Life Insurance Co. v. Dutton*, 419 So.2d 1357 (Ala. 1982); *Anderson v. Continental Insurance Co.*, 271 NW2d 368 (Wis. 1978); *Gruenberg v. Aetna Insurance Co.*, 9 Cal. 3d 566, 108 Cal. Rptr. 480, 510 P.2d 1032 (1973).

That special relationship either arises from the element of trust necessary to accomplish the goals of the undertaking, or from the huge disparity in bargaining power between the parties.<sup>58</sup> Both of these events are plainly present in the special relationship existing between resident and nursing home. Accordingly, the failure on the part of the facility to exercise its broad discretion in matters pertaining to the care of frail and debilitated residents in a manner consistent with their health, safety and best interest would appear to be actionable under the tort doctrine of breach of a good faith and fair dealing duty. Under such theory, proof of these ministerial omissions specifically set forth in the *Checklist of Omissions* above, or the false, misleading and deceptive practices will convincingly support a finding of such breach.

## **§1.07 Blueprint of a Nursing Home Pleading**

### **A] PLEADING OBJECTIVES**

It is universally recognized that a pleading must set forth a cause of action against a defendant and sufficiently inform such defendant of the wrongful conduct

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<sup>57</sup>Id., 271 NW2d at 374.

<sup>58</sup>See, e.g., *Commercial Cotton Co. v. United Cal. Bank*, 209 Ca. Rptr. 551, 554 (Ct. App. 1985) (bank depositor relationship is "at least quasi-fiduciary" entailing good faith duties); *Gates v. Life of Mont. Ins. Co.*, 668 P.2d 213, 214 (Mont. 1983) (employment relationship parallels insurance relationship requiring implied tort duties of good faith and fair dealing); *Hoskins v. Aetna Life Ins. Co.*, 452 N.E.2d 1315, 1319 (Ohio 1983) (the special nature of the relationship existing between the insurer and its insured necessitates good faith requirements); *Nicholson v. United Pac. Ins. Co.*, 710 P.2d 1342, 1348 (Mont. 1985); *Bay Point Mortgage v. Crest Premium Real Estate Investment Retirement Trust*, 168 Ca. App. 3d 818, 214 Ca. Rptr. 531 (1985); *Commercial Cotton Co. v. United California Bank*, 103 Cal. App. 3d 511, 209 Cal. Rptr. 551 (1985); *Schweiso v. Williams*, 150 Cal. App. 3d 846, 198 Cal. Rptr. 238 (1984); *Cleary v. American Airlines*, 111 Cal. App. 3d 487, 168 Cal. Rptr. 722 (1980).

See, Comment, *New Tort for Texas: Breach of the Duty of Good Faith and Fair Dealing* 18 St. Mary's L.J. 1295, 1309.

forming the basis of the plaintiff's complaint. Lawyers take different views, however, as to the level of specificity which should be employed to describe the manner and means by which defendant caused harm to plaintiff. Some lawyers take the view that the case should be plead in as general terms as possible until such time as defendant, through use of special exceptions, forces a more definitive pleading. Although this strategy may have merit when plaintiff has not had the opportunity to fully investigate the case, from a practical standpoint, such practice potentially represents a drain on the finite amount of time that a plaintiff's lawyer has to invest. This author takes the view that a pleading should not only specifically set forth the underlying causes of action but also should develop and exploit the key points and themes of the case. The discussion which follows identifies and amplifies by way of example some of the key themes and points which counsel should contemplate when pleading a nursing home case involving the causes of action for: 1) Negligence; 2) Negligence Per Se; 3) Tortious Breach of Fiduciary Duty and Good Faith and Fair Dealing Duty; 4) Gross Negligence; 5) Deceptive Trade Practice; and 6) Fraud.

## B] BASIC ISSUES INFLUENCING THE STRUCTURE OF THE PLEADING

An extensive analysis of federal and state law relating to nursing home operation as well as a thorough review of more than fifty (50) petitions filed by this author or other attorneys against nursing home defendants for of the theories of recovery described above reveals that the fundamental structure of each nursing home cause of action is influenced by the following issues.

1. Is plaintiff a private pay resident or Medicaid recipient?
2. If the resident is a Medicaid recipient, does he/she occupy a bed on a certified skilled wing or certified intermediate wing?
3. What is the nature of plaintiff's injuries?
4. What are the likely factual defenses to plaintiff's lawsuit?

A discussion of these issues is integrated into the comments following the below pleading examples.

## C] NEGLIGENCE AS A CAUSE OF ACTION

### **(1) PART ONE: SETTING THE STAGE**

- o **Defendant was in the nursing home business to make money by caring for chronically infirm, helpless, and/or mentally dysfunctional residents.**

Pleading Example: At all times mentioned herein Defendant Loving Arms Nursing Home, Inc. was and remains a proprietary corporation engaged in the for profit operation of a nursing home, Loving Arms Nursing Home, which claimed to "**specialize**" in the care of helpless individuals who were chronically infirm, mentally dysfunctional and/or in need of nursing care and treatment.

Comment: At the outset of the nursing home case, one of the critical points which must be established and carried forward as a theme permeating the entirety of Plaintiff's litigation strategy is simply that the defendant nursing home is not a charitable organization, but rather is a business whose primary goal is to make money. There is nothing illegitimate about this goal in and of itself. Often, however, the defense will attempt to downplay the profit motives of the nursing home while at the same time emphasizing the four points listed below in an effort to promote the appearance and charitable character of the care services rendered to plaintiff.

- o Nursing homes play a valuable role in today's society, caring for the infirm elderly whose families will not or cannot accept responsibility for them;
- o Defendant nursing home came to the rescue of plaintiff's family, opening its arms to plaintiff when his/her needs became too burdensome for the family;
- o Caring for the elderly infirm is a thankless and difficult job which few health care facilities are willing to assume;
- o Defendant nursing home participates in the Medicaid program for altruistic reasons and as a favor to the state and public at large.
- o **Plaintiff was admitted to defendant's nursing home because he/she was chronically infirm, helpless and/or mentally dysfunctional.**

Pleading Example: In 1984, Jane Doe, at age 77, became a resident of Loving Arms Nursing Home after having suffered a fractured right hip. This condition, in conjunction with diagnosis of diabetes mellitus, arteriosclerotic cardiovascular and hypertensive disease and renal calculus, forced Plaintiffs to consider placing their mother in a

nursing home. Due to the fact that Plaintiffs were not able to care for their mother, they agreed with Ms. Doe's physician that her care required professional attention and selected Loving Arms Nursing Home.

Pleading Example - Private Pay Patient: On or about September 30, 1987, Jane Doe was admitted for long term geriatric care to Loving Arms Nursing Home after having suffered a fractured right hip. This condition, in conjunction with diagnosis of diabetes mellitus, arteriosclerotic cardiovascular and hypertensive disease and renal calculus, forced Plaintiffs to consider placing their mother in a nursing home. Due to the fact that Plaintiffs were not able to care for their mother, they agreed with Ms. Doe's physician that her care required professional attention and selected Loving Arms Nursing Home. Her monthly bills and charge from Defendant were paid from Ms. Doe's pension and life savings, put aside over the years to assure that she was properly cared for in a dignified manner when she became dependant on others for assistance with basic activities of daily living.

Comment: Again, the pleading is used to stress a key point as well as disarm the potential impression that defense counsel or fact finder might entertain about the level of willingness or capacity of plaintiff's family to care for plaintiff. The family's inability, albeit unwillingness, to care for plaintiff is so important to the nursing home case which involves a wrongful death claim or relies in any degree upon the credibility of the family's testimony, that it is incumbent upon plaintiff's counsel to eliminate at the outset the possibility of this negative fact.

**o Defendant was well aware of plaintiff's condition and level of dependency.**

Pleading Example: Corporate Defendants were well aware of: a) Jane Doe's medical condition including the fact that she was an insulin-dependent diabetic; and b) the care that Jane Doe required when it represented that it could adequately care for the needs of Jane Doe and persuaded the Plaintiffs to admit her to Loving Arms Nursing Home.

- o **Plaintiff's condition and care needs were similar to other residents in the facility.**

Pleading Example - Medicaid Recipient: Defendant actively sought patients with similar medical and nursing needs as plaintiff in order to fill its empty beds, increase its rate of occupancy and overall revenues. In fact, Jane Doe was the kind of resident whose care, *paid for by the government*, said Defendants actively sought in order to fill their empty beds and to increase their rate of occupancy.<sup>59</sup>

Pleading Example - Private Pay Resident: Defendant actively sought patients with similar medical and nursing needs as plaintiff in order to increase its rate of occupancy and overall revenues.

- o **Defendant represented that it could adequately meet the total nursing needs of plaintiff and made claims to further the trust of plaintiff's family and regulatory agencies.**

Pleading Example - Medicaid Recipient: In an effort to assure that Jane Doe and other patients whose care was funded by the government were placed at Loving Arms Nursing Home, your Corporate Defendants held themselves out to Texas Department of Health [TDH], *Texas Department of Human Services [TDHS]*<sup>60</sup>, and the public at large as being: a) skilled in the performance of nursing, rehabilitative and other medical support services; b) properly staffed, supervised, and equipped to meet the total needs of its nursing home residents; and c) able to specifically meet the total nursing, medical and physical therapy needs of Jane Doe and other residents like her. Additionally, in the case of Jane Doe, said Defendants made specific representations and promises to Plaintiffs regarding the quality and quantity of professional medical and nursing care which

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<sup>59</sup> This sentence is only applicable if plaintiff was an eligible Medicaid recipient. If plaintiff is a private pay resident this sentence is not applicable.

<sup>60</sup> In Texas, the Texas Department of Human Services [TDHS] is responsible for the administration of Title XIX Medicaid program. The Texas Department of Health [TDH] is responsible for licensure of all nursing homes. Accordingly, [TDHS] or a similar state regulatory agency responsible for administration of the Medicaid program should not be referred as a source of representation in the case of a private pay patient (i.e. non-Medicaid recipient).

would be provided. On the basis of these claims, plaintiff and his/her family placed their trust in defendant.

Pleading Example - Private Pay Patient: In an effort to assure that Jane Doe and other patients were placed at Loving Arms Nursing Home, your Corporate Defendants held themselves out to Texas Department of Health [TDH] and the public at large as being: a) skilled in the performance of nursing, rehabilitative and other medical support services; b) properly staffed, supervised, and equipped to meet the total needs of its nursing home residents; and c) able to specifically meet the total nursing, medical and physical therapy needs of Jane Doe and other residents like her. Additionally, in the case of Jane Doe, said Defendants made specific representations and promises to Plaintiffs regarding the quality and quantity of professional medical and nursing care which would be provided. On the basis of these claims, plaintiff and his/her family placed their trust in defendant.

Comment: This pleading point and the two which immediately precede it are necessary to counter the common defensive strategy which focuses upon the prior medical condition of plaintiff and urges the trier of fact to conclude that said plaintiff was unfortunately in such poor shape that no amount of care could have halted his/her inevitable injuries. The complex nature of plaintiff's medical condition upon admission to the nursing home, coupled with a general ignorance upon the part of the public at large (and even a bias regarding the aging process and diseases associated with it), drives this defensive posture and forces plaintiff's counsel to adopt, at the outset of the case, a strategy which re-focuses the spotlight back on the nursing home. Such strategy is accomplished by weaving a common thread through the case consisting of:

- o Representations and claims by the nursing home that it was capable of meeting the total needs of a patient such as the plaintiff;
- o The efforts of defendant nursing home to recruit and obtain through referral sources, other residents with conditions similar to those presented by plaintiff

## **(2) PART TWO: THE INJURIES SUFFERED BY VICTIM**

- o **Defendants abused this trust by engaging in persistent and recurrent negligence which proximately caused plaintiff to suffer catastrophic injuries which included [list].**

Pleading Example: Defendant wholly failed to discharge its obligations of care to Plaintiff. As a consequence thereof, Plaintiff suffered catastrophic injuries, extreme pain, suffering and mental anguish. The scope and severity of the recurrent negligence inflicted upon Plaintiff while she was under the *care* of the facility accelerated the deterioration of her health and physical condition beyond that caused by the normal aging process; resulted in the physical and emotional trauma described below; and hastened her death. More specifically Plaintiff's gruesome and agonizing death was precipitated by the following injuries:

- o Massive bedsores, otherwise known as decubitus ulcers or pressure sores, which slowly developed on Plaintiff causing her to undergo otherwise unnecessary surgeries and medical treatments as well as causing excruciating pain, suffering and mental anguish;
- o Ulcerated, pus-infiltrated and festering necrotic pressure sores and lesions on the body of Plaintiff which became so grossly infected and contaminated that the wound infection spread into her bloodstream;
- o Severe dehydration;
- o Severe urinary tract infections;
- o Overwhelming sepsis and blood-borne toxic infections;
- o All of the above-identified injuries as well as the conduct specified below caused Plaintiff to lose her personal dignity; caused her great shame and humiliation; caused her death to be preceded by extreme and unnecessary pain, degradation, anguish and emotional trauma; and, further greatly hastened her death.

### **(3) PART THREE: SPECIFIC ACTS OF NEGLIGENCE**

#### **(a) Subpart A: The Missing Building Blocks of Care**

Deficiencies in the basic ingredients necessary to assure that nursing home patients receive fundamental and necessary care are discussed hereinbelow. The care of each resident hinges upon the simultaneous presence of: 1) adequate numbers of nursing personnel (including aides and orderlies); 2) adequate amounts of food, supplies, equipment, and medication; 3) competent nursing staff (including aides and orderlies) who have been formerly screened and monitored in order to eliminate unfit potential and current employees; 4) adequately trained personnel who are assigned duties consistent with their demonstrated level of competency; 5) adequate planning to assure that each resident has an individualized care plan which addresses each problem and is updated when said resident's condition changes; 6) adequate policies and procedures to assure that personal care is provided on a uniform and uninterrupted basis to each resident; 7) adequate supervision and monitoring of nursing personnel to assure that the health care plan, physician's orders and policies/procedures have been implemented/complied with; and 8) adequate assessment and evaluation of each resident on a frequent basis to assure that changes in condition are addressed on a timely basis. These basic ingredients are represented in the illustration found below. The pleading examples which follow describe the scope of ministerial omissions which are frequently linked to substandard personnel care by nursing home staff.

#### **Sample Pleadings:**

The injuries and resultant damages to plaintiff was proximately caused by one or more of the following acts of negligence on the part of Defendant Loving Arms Nursing Home:

- o The failure to provide sufficient numbers of qualified personnel, including nurses, nurse assistant, medication aides, and orderlies, [hereinafter nursing personnel] to meet the total needs of John Doe in conjunction with the needs of other residents of Loving Arms Nursing Home.

Comment: One of the key points made in the above pleading excerpt is that the cumulative workload imposed on staff by the patient population including plaintiff greatly eclipsed the physical ability of the limited number of staff on duty. In other words, the staff employed were required to render care to plaintiff and other

residents simultaneously. Obviously if said staff had been exclusively assigned to care for Plaintiff, staffing would have been adequate in number.

- o The failure to increase the numbers of nursing personnel at Loving Arms Nursing Home to ensure that John Doe: 1) received prescribed treatment, medication and diet; 2) received necessary fluids and water to prevent dehydration; and 3) was protected from accidental injury by the correct use of ordered and reasonable safety measures.
- o The failure to provide nursing personnel sufficient in number to provide proper care to John Doe and other residents at Loving Arms Nursing Home so as to keep the said John Doe clean and comfortable and to prevent the formation of decubitus ulcers, lesions and sores on his body.
- o The failure to provide adequate supervision to the nursing staff so as to assure that John Doe received adequate and proper nutrition, fluids, therapeutic diet, sanitary care, treatments, medications, repositioning, turning and skin care to prevent the formation of decubitus ulcers, lesions and sores, decubiti care to prevent infection, and sufficient nursing observation and examination of the responses, symptoms and progress in the physical condition of John Doe.
- o The failure to adequately assess, evaluate and supervise registered nurses, licensed vocational nurses, nurses aides or assistants, medication assistants, dietary personnel and laundry personnel so as to assure that John Doe received good, proper nursing care in accordance with Loving Arms Nursing Home's policies and procedures manuals, the Texas Department of Human Services' [TDHS] minimum standards of participation for skilled nursing facilities, the Texas Department of Health's [TDH] minimum licensing standards for nursing homes, and the regulations of the U.S. Department of Health and Human Services.
- o The failure to adequately supervise the Administrator of Loving Arms Nursing Home.
- o The failure to adequately supervise the Director of Nurses at Loving Arms Nursing Home.

- o The failure to provide a nursing staff that was properly manned, qualified, trained and motivated.
- o The failure to adequately screen, evaluate and check references, test for competence and use ordinary care in selecting nursing personnel to work at Loving Arms Nursing Home.
- o The failure to terminate employees at Loving Arms Nursing Home assigned to care for John Doe that were known to be careless, incompetent or unwilling to comply with the policies and procedures of Loving Arms Nursing Home and the rules and regulations promulgated by TDH and TDHS.
- o The failure to assign nursing personnel at Loving Arms Nursing Home duties consistent with their education and experience based on: 1) John Doe's medication history and condition, nursing and rehabilitative needs; 2) the characteristics of the patient population residing on the wing where John Doe was a patient between the dates of November 25, 1989 to January 9, 1990; and 3) the nursing skills needed to provide care to such patient population.
- o The failure to establish, publish and/or adhere to policies for nursing personnel concerning the care and treatment of residents with nursing, medical and psychosocial needs similar to those of John Doe.
- o The failure to provide and assure an adequate nursing care plan based on the needs of John Doe at the time of his admission to Loving Arms Nursing Home.
- o The failure to provide and assure adequate nursing care plan revisions and modification as the needs of John Doe changed.
- o The failure to implement and assure that a adequate nursing care plan for John Doe was followed by nursing personnel.
- o The failure to adopt adequate guidelines, policies and procedures for: a) investigating the relevant facts underlying any deficiencies or licensure violations or penalties found to exist at Loving Arms Nursing Home by the Texas Department of Health or any state or federal survey agency; b) the cause of any such deficiency, violation, or penalty; and c) the method and means for correcting deficiencies or licensure violations or penalties found to exist at Loving Arms Nursing Home.

- o The failure to adopt adequate guidelines, policies, and procedures for determining whether Loving Arms Nursing Home had sufficient numbers of nursing personnel which includes registered and licensed vocational nurses, nurse assistants, medication assistants, orderlies and other staff to: 1) provide 24-hour nursing services; 2) meet the needs of residents who are admitted to and remain in the facility; 3) meet the total nursing needs of recipient-patients.
- o The failure to adopt adequate guidelines, policies and procedures of Loving Arms Nursing Home for documenting, maintaining files, investigating and responding to any complaint regarding the quantity of patient care, the quality of patient care or misconduct by employees at Loving Arms Nursing Home, no matter whether such complaint derives from a resident of said facility; an employee of the facility; or any interested person.
- o The failure to take reasonable steps to prevent, eliminate and correct deficiencies and problems in patient care at Loving Arms Nursing Home.
- o The failure by the members of the governing body of Loving Arms Nursing Home to discharge their legal and lawful obligations by 1) assuring that the rules and regulations designed to protect the health and safety of patients, such as John Doe, as promulgated by the Texas Department of Health and the Texas Department of Human Services were consistently complied with on an ongoing basis; 2) assuring that the patient care policies for Loving Arms Nursing Home were consistently complied with on an ongoing basis; 3) assuring that the policy and procedure manuals for Loving Arms Nursing Home were updated and modified to address problems which consistently emerged at the facility; 4) responsibly assuring that appropriate corrective measures were implemented to cure problems concerning inadequate patient care.

(b) Subpart B: Personal Care Deficiencies

The specific acts of negligence which are related to the unique nursing needs and the medical condition of the plaintiff are addressed herein. The nursing care required by plaintiff can be ascertained by: 1) identifying level of dependency and fundamental care needs; and 2) identifying the specific medical diagnosis or condition presented by plaintiff and reviewing appropriate textbooks, literature and journals which describe the specific care procedures and strategies which should be implemented. The following pleading examples are derived from: 1) a decubitus ulcer case; 2) a fall case; 3) "wander off" case; 4) malnutrition case; and 5) diabetic reaction case; and describe the wide range of care failures which are frequently linked with this type of injury:

**(i) Sample pleadings - Decubitus ulcer case:**

The injuries and resultant damages to plaintiff was proximately caused by one or more of the following acts of negligence on the part of Defendant Loving Arms Nursing Home:

- o The failure to assure and provide adequate turning and repositioning of John Doe so as to prevent the formation of decubitus ulcers, lesions and sores on the body of John Doe.
- o The failure to provide and assure that John Doe received necessary toileting and assistance with his urinal.
- o The failure to provide and assure that John Doe received adequate bathing daily and after each incontinent episode so as to prevent urine contact and fecal contact with his skin for medically unsafe periods of time.
- o The failure to provide and assure that John Doe received adequate sanitary care to prevent infection.
- o The failure to assure and provide a change of bed linens to John Doe as needed so as to prevent urine contact and fecal contact for medically unsafe periods of time.
- o The failure to provide and assure that John Doe received adequate skin care so as to prevent the formation of decubitus ulcers, lesions and sores on his body.

- o The failure to provide and assure that John Doe received adequate observation and examination for skin breaks and decubiti so as to timely and adequately intervene to prevent the formation of ulcerated, pus-infiltrated, festering and necrotic sores and lesions on his body.
- o The failure to assure and provide John Doe with adequate nursing care, treatments and medications for decubiti after the development of decubiti by John Doe.
- o The failure to assure and provide care, treatment and medications to John Doe in accordance with physician's orders.
- o The failure to provide to and assure that John Doe received adequate water and fluids.
- o The failure to provide and serve to John Doe sufficient food and nutritional supplements to meet his nutritional needs.
- o The failure to increase the caloric and protein intake of John Doe after the development and/or deterioration of a decubitus ulcer.
- o The failure to notify the attending physician of John Doe of significant changes in his physical condition, to wit: the development of decubitus ulcers and concerning persistent unresolved problems relating to the care and physical condition of John Doe.

**(ii) Sample pleading - The Fall case:**

- o From the time she was admitted and throughout her three-year residency at Loving Arms Nursing Home, Ms. Doe was vulnerable and susceptible to serious injury as a consequence of falls. Her susceptibility to falls and subsequent injury was a function of: a) periodic intervals of confusion and cognitive impairment; b) gait, station and balance abnormalities due to previous fracture and osteoarthritis in her knees and shoulders; c) history of blackouts and seizure disorder; d) prescribed use of diuretics and dilantin; e) impaired vision due to cataracts; f) osteoporosis; and g) use of wheelchair as a walking assistance device. The foregoing risk profile was clearly manageable through application of fundamental nursing principles. By implementation of well-recognized precautions and safety measures, utilized in reasonable nursing homes of ordinary prudence, Ms. Doe could have been protected

from injury due to falls. It was extremely important to the health and safety of Ms. Doe that Loving Arms Nursing Home apply these recognized principles on a continuing basis.

- o More specifically, Loving Arms Nursing Home was negligent in the following respects:
  - a) Failure to assess Ms. Doe's predisposition for falling and formulating a plan of care which adequately addressed this known risk;
  - b) Failure to alert and inform the staff that Ms. Doe was a patient who was prone to falls and thus at risk for injury if appropriate precautions were not taken;
  - c) Failure to search for the underlying cause and investigate the factors that may have contributed to Ms. Doe's falls, and implement precautions and preventive measures to prevent the same;
  - d) Failure to check and monitor Ms. Doe sufficiently and at frequent enough intervals to assure that she was comfortable and her toileting needs were met, despite knowledge by Defendant of Ms. Doe's history of falls and injury;
  - e) Failure to assess Ms. Doe's usual pattern of urination and individualized toileting schedule;
  - f) Failure to regularly assess Ms. Doe's mental clarity, judgement, coordination and ambulation status so as to recognize those times when Ms. Doe was more susceptible to falls;
  - g) Failure to assure that Ms. Doe was appropriately supervised and helped during transfers and when walking;
  - h) Allowing Ms. Doe to utilize the wheelchair as a walking device;
  - i) Failure to adopt adequate guidelines, policies and procedures for the protection of residents who were: 1) susceptible to falls and serious injury resulting therefrom; and 2) susceptible and vulnerable to malnutrition and dehydration if not provided ordinary nursing care which was directed at preventing the same. The policies, guidelines and procedures include the following:

- i) Policies, guidelines and procedures to identify those patients in the facility at higher risk for: 1) falls and serious injury resulting therefrom; and 2) malnutrition and dehydration if not provided ordinary nursing care which was directed at preventing the same.
- ii) Policies, guidelines and procedures to measure through implementation of a risk-assessment tool, the risk and susceptibility of patients at Loving Arms Nursing Home for: 1) falls and serious injury resulting therefrom; and 2) malnutrition and dehydration, at time of admission and at periodic intervals thereafter;
- iii) Policies, guidelines and procedures to prevent: 1) falls and serious injury resulting therefrom; and 2) malnutrition and dehydration;
- iv) Policies, guidelines and procedures to formulate, modify and update as the condition of the patient requires, a plan of care for the prevention of: 1) falls and serious injury resulting therefrom; and 2) malnutrition and dehydration;
- v) Policies, guidelines and procedures to assure that the cause of any fall, weight loss, malnutrition and dehydration was fully investigated in order to assure that appropriate precautions were developed to prevent the reoccurrence of these conditions;
- vi) Policies, guidelines and procedures to assure that necessary and ongoing assessments are conducted as to any patient who suffered one of the following: 1) falls and serious injury resulting therefrom; and 2) malnutrition and dehydration;
- vii) Policies, guidelines and procedures to assure that the attending physician for any patient who is at risk for: 1) falls and serious injury resulting therefrom; and 2) malnutrition and dehydration if not provided ordinary nursing care which was directed at preventing the same, is notified of any significant change of condition in the patient on a timely basis;
- viii) Policies, guidelines and procedures to monitor the incidence of: 1) falls and serious injury resulting

therefrom; and 2) malnutrition and dehydration at Loving Arms Nursing Home.

**(iii) Sample pleadings - Diabetic reaction case:**

- o These injuries were proximately caused by one or more of the following acts of negligence on the part of Corporate Defendants:
  - a) The failure to recognize the classic symptoms of insulin shock presented by Jane Doe;
  - b) The failure to properly schedule insulin administration to Jane Doe based on the meal service hours at said facility;
  - c) The failure to offer and assure that Jane Doe received nutritional supplements or substitutes when she did not consume her regular meal;
  - d) The failure to assure that Jane Doe consumed sufficient amounts of calories to utilize the insulin administered to her;
  - e) The failure to notify and assure that Jane Doe's attending physician was notified of any insulin reaction or symptoms suggestive of the same presented by the said Jane Doe;
  - f) The failure to adequately monitor Jane Doe's condition after she developed symptoms suggestive of insulin reaction and went into insulin shock;
  - g) The failure to assure that Jane Doe's health care plan identified the times that insulin levels peaked in Ms. Doe's body;
  - h) The failure to assure that nursing personnel at Loving Arms Nursing Home understood how to manage an insulin-dependent diabetic such as Jane Doe;
  - i) The failure to administer a gluometer test to Ms. Doe as ordered when she developed symptoms suggestive of an insulin reaction;
  - j) The failure to adopt adequate guidelines, policies and procedures for the proper care and treatment of diabetes mellitus and the prevention of insulin reactions, including but not limited to policies, guidelines and procedures which

describe the steps to be taken by nursing and/or dietary personnel of Loving Arms Nursing Home to:

- i) assure that insulin was not inappropriately administered when a resident had not consumed adequate calories to cover the amount of insulin ordered;
- ii) assure that adequate amounts of calories were consumed to utilize the insulin administered to insulin-dependent diabetics; and
- iii) assure that insulin-dependent diabetics were observed and assessed at times when their insulin levels peaked based on the time and amount of insulin administered.

**(4) PART FOUR: CAUSATION**

Pleading Example: A reasonably prudent nursing home, operating under the same or similar conditions, would not have failed to provide the important care listed above. Each of the foregoing acts of negligence on the part of your Corporate Defendants operating separately, in combinations of two or more, or jointly and cumulatively was a proximate cause of John Jones's injuries, death and the damages which are more specifically described below.

**(5) PART FIVE: DAMAGES**

Pleading Example:

By reason of that conduct described in CAUSES OF ACTION ONE, TWO, THREE, FOUR, FIVE, SIX and SEVEN, Plaintiffs assert in their representational capacity a claim for all medical expenses, damages for physical pain, suffering, mental anguish, disability, disfigurement, loss of enjoyment of life and all other damages sustained by the said John Jones.

In addition thereto, Plaintiffs assert a claim in their own right for all damages to which they may be justly entitled by reason of the wrongful conduct alleged in CAUSES OF ACTION ONE through SEVEN. Your Plaintiffs experienced the horror of viewing the cavities of rotting flesh which had disfigured the body of their loved one due to the neglect of Defendants. Your Plaintiffs have experienced and will continue to experience mental anguish and bereavement and physical and emotional trauma by reason of the devastating injuries to John Jones and the

excruciating death he suffered. Furthermore, the knowledge that her own father, in the case of Susan Smith, and her loving husband, in the case of Jane Jones, was subjected to prolonged suffering and anguish inflicted while the said John Jones developed smouldering infections and massive putrefied bedsores, has permanently altered the loving and cherished memories of him, thereby causing additional anguish and emotional distress.

By reason of that conduct set forth hereinabove Plaintiffs sue in every capacity and for every element of damages to which they are justly entitled. The amount of damages prayed for herein far exceeds the minimum jurisdiction of this Court.

The wrongful conduct specifically alleged hereinabove in CAUSES OF ACTION ONE, TWO, THREE, FIVE SIX and SEVEN, constitutes fraud and gross negligence as such term is defined in law. By reason of such conduct, Plaintiffs are entitled and therefore assert a claim for punitive damages in an amount sufficient to punish and deter Defendants and others like them from such conduct in the future. The amount of damages prayed for herein far exceeds the minimum jurisdiction of this Court

## C] PLEADING NEGLIGENCE PER SE

The negligence per se pleading basically consists of four parts. Each of these is described below.

### **(1) Part One: Legal Status of Defendant and Its Victim**

In constructing a negligence per se pleading, plaintiff's attorney must pay close attention to the victim's status as a "private pay patient" versus a "Medicaid recipient." With respect to a private pay patient, the nursing home may not be under an obligation to conform its care to the standards of participation promulgated for the benefit of residents of certified skilled or intermediate facilities. For example, in Texas, the Department of Human Services promulgates specific regulations applicable to those nursing homes which participate as providers in the Medicaid program. A nursing home which does not participate in the program is under no obligation to comply with the standards of participation. A nursing home participating in the program, which has a wing designated as "private pay only," is under no obligation to comply with the aforementioned regulations on that specific wing. However, a nursing home must comply with Medicaid regulations with regard to a private pay

patient if he/or she resides on a certified skilled or intermediate wing.<sup>61</sup> Additionally, in the case of a Medicaid recipient, counsel must carefully distinguish the type of facility where Plaintiff resided. Did plaintiff occupy a bed on a wing in the nursing home certified as a skilled nursing facility wing?<sup>62</sup> Or did plaintiff occupy a bed in the intermediate wing of the nursing home?<sup>63</sup> Since the regulations pertaining to skilled nursing facilities are more stringent than the regulation pertaining to intermediate nursing facilities, this distinction not only impacts upon the duties owed by the nursing home to plaintiff, but determines the context of the negligence per se pleading.<sup>64</sup>

Pleading Example - Medicaid Recipient: Plaintiffs would show that Defendant, Loving Arms Nursing Home, is a licensed nursing home, as such term is understood in law, and certified for participation in the Medicaid program as an intermediate and skilled care facility. By reason of its election to participate as a long term care provider Defendant was able to enjoy substantial revenues paid for by taxpayer-funded programs. Not only did government programs provide Defendant with a guaranteed payment source but also with an continual flow of residents whose care was paid for by the Medicaid program or some other taxpayer-funded program. Having availed itself of the privileges and financial benefits available to licensed nursing home operators, certified for participation in such programs, Defendant is and at all times material to this lawsuit was required to comply with: 1) the rules and regulations promulgated by the Texas Department of Health, 25 TEXAS ADMINISTRATIVE CODE § 145.1 et seq.; 2) the Minimum Standards of Participation imposed by the Texas Department of Human Services, 40 TEXAS ADMINISTRATIVE CODE § 16.901 et seq.; 3) the Federal Minimum Standards of Participation imposed by the United States

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<sup>61</sup> Effective October 1, 1990 "Skilled Nursing Facilities" (SNF's) and "Intermediate Care Facilities" (ICF's) participating as Medicaid providers will be regulated under the single category of "Nursing Facilities." No longer will there be a distinction between the quantity of care required on a SNF wing and an ICF wing. However, the distinction still applies in Medicare reimbursement cases. Due to the fact ICF and SNF wings are no long certified for purely Medicaid providers a "private pay patient" who resides in a nursing facility may no longer be owed the same care owed a "Medicaid resident." Beds are certified as being either "nursing facility" or "non-nursing facility." For cares arising after October 1, 1990, counsel should be cautious in this area as the bridge which formerly existed between the care owed the private patient on a certified wing and the care owed a Medicaid recipient may have been removed.

<sup>62</sup> Ibid.

<sup>63</sup> Ibid.

<sup>64</sup> Ibid.

Department of Health and Human Services, 42 Code of Federal Regulations § 405.301 et seq. Moreover, since John Doe was certified as an eligible recipient of Medicaid by virtue of his age, medical history, nursing needs and financial status; and since he occupied a bed located in a certified wing at Loving Arms Nursing Home, Defendant was at all times material to this lawsuit required to comply with the foregoing rules and regulations in caring for the said John Doe.

Pleading Example - Private Pay Patient: Plaintiffs would show that Defendant Loving Arms Nursing Home is a licensed nursing home, as such term is understood in law. Accordingly, Defendant was at all times material to this lawsuit required by statute to comply with the rules and regulations promulgated by the Texas Department of Health, 25 TEXAS ADMINISTRATIVE CODE §145.1 et. sec.

Comment: Obviously, the first pleading example is applicable to a Texas nursing home licensed by the Texas Department of Health and certified as a health care provider in the Medicaid program in accordance with the standards of participation promulgated by the Texas Department of Human Services, and the federal standards of participation. These regulations would only be applicable to a Medicaid-certified facility. The second example is applicable to a nursing home which is only certified in part as a Medicaid facility or which has no such certification.

## **(2) Part Two: Key Regulations Violated**

- o Violation of staffing regulations for a skilled wing.

### Examples:

- o Defendant has violated the law by failing to provide 24-hour nursing services, seven day a week to meet the needs of John Doe after being admitted to and while remaining at Loving Arms Nursing Home in violation of 42 CFR 483.28 (effective September 30, 1990)<sup>65</sup> and 25 TAC § 145.17(a)(1).
- o Defendant has violated the law by failing to have 24-hour nursing services from enough qualified nursing personnel to meet the total

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<sup>65</sup> Prior to September 30, 1990, see 42 CFR 405.1124 (c) as made applicable to skilled nursing facilities through 42 CFT 442.202.

nursing needs of John Doe in violation of 42 CFR 483.28 (effective September 30, 1990)<sup>66</sup> and 40 TAC § 16.3001.

- o Regulations pertaining to staffing numbers for an intermediate care wing.

Pleading Examples:

- o Defendant has violated the law by failing to have staff on duty 24 hours a day sufficient in number and qualification to carry out the explicit policies, responsibilities and programs of Defendant nursing home in violation of 42 CFR § 483.29 (effective September 30, 1990)<sup>67</sup>
- o Defendant has violated the law by failing to provide services for sufficient numbers of nursing personnel on a 24-hour basis in accordance with plaintiff's care plan in violation of 42 CFR § 483.30 (a)<sup>68</sup>
- o Defendant has violated the law by failing to have sufficient nursing staff to provide nursing and related services to maintain the highest practical physical, mental and psychosocial well-being of plaintiff in violation of 42 CFR § 483.30.<sup>69</sup>
- o Subject named facility has violated the law by failing to provide services for sufficient numbers of nursing personnel on a 24-hour basis in accordance with plaintiff's care plan in violation of 42 CFR § 483.30 (a)<sup>70</sup>
- o Subject named facility has violated the law by failing to have sufficient nursing staff to provide nursing and related services to maintain the highest practical physical, mental and psychosocial well-being of plaintiff in violation of 42 CFR § 483.30.<sup>71</sup>

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<sup>66</sup> Ibid.

<sup>67</sup> Prior to September 30, 1990, see 42 CFR 442.302.

<sup>68</sup> Prior to September 30, 1990 no corresponding regulation was in force and effect.

<sup>69</sup> Ibid.

<sup>70</sup> Prior to September 30, 1990 no corresponding regulation was in force and effect.

<sup>71</sup> Ibid.

- o Violation of dietary and fluid regulations for a skilled and intermediate wing.

Pleading Examples:

- o Defendant violated the law by failing to provide plaintiff with a nourishing, palatable, well-balanced diet that met his daily nutritional and special dietary needs in violation of 42 CFR § 483.35 (effective September 30, 1990)<sup>72</sup>
- o Defendant has violated the law by failing to assure that plaintiff received three meals daily with there being no more than 14 hours between a substantial evening meal and breakfast the following day, in violation of 42 CFR § 483.35 (f) (effective September 30 1990)<sup>73</sup>
- o Defendant violated the law by failing to assure that plaintiff maintained body weight and protein levels when such maintenance was reasonable in light of plaintiff's condition, in violation of 42 CFR § 483.25 (i) (1) (effective September 30 1990)<sup>74</sup>
- o Defendant violated the law by failing to provide plaintiff with sufficient fluid intake to maintain proper hydration and health in violation of 42 CFR § 483.25 (j) (effective September 30, 1990)<sup>75</sup>
- o Regulations regarding reporting changes in patient condition.

Pleading Example: Defendant has violated the law by failing to observe, recognize, record and report to the physician sudden and/or severe changes in John Doe's signs and symptoms and/or conditions in violation of 25 TAC § 145.17(b)(10) and 40 TAC § 16.3014(f).

- o Regulations regarding medication administration in accordance with physician orders.

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<sup>72</sup> Prior to September 30, 1990 see 42 CFR § 405.1125 for skilled wing and 42 CFR § 442.331 for intermediate care wing.

<sup>73</sup> Ibid.

<sup>74</sup> No corresponding regulation existed prior to September 30, 1990.

<sup>75</sup> Ibid.

Pleading Example: Defendant has violated the law by failing to administer all medications to John Doe in accordance with physician's orders in violation of 25 TAC §145.21(c)(1) and 40 TAC §16.3017(a).

- o Regulations pertaining to the obligation of the nursing home to discharge the resident if such resident's needs exceed the care capabilities of the nursing home.

Pleading Example: Defendant violated the law by failing to discharge John Doe from Loving Arms Nursing Home when the needs of Mr. Doe could not be met through service from the facility staff, violated 25 TAC §§ 145.13(a)(2)(A) and 145.13(a)(3)(H) and 40 TAC § 16.1503(c).

- o Nursing Care Plan violation.

Pleading Example: Defendant violated the law by failing to ensure that a nursing care plan based on John Doe's problems and needs was established which contained long term goals, short term objectives and approaches to meet such needs and was reviewed and revised when John Doe's needs changed, in violation of 42 CFR § 483.20 (d) (effective September 30, 1990)<sup>76</sup> 40 TAC §16.3010(11).

- o Decubitus Prevention.

Pleading Example: Defendant violated the law by failing to encourage and help John Doe to change positions at least every two hours day and night and as prescribed by his attending physician in order to stimulate circulation and discourage decubiti and deformities, violated 40 TAC §16.3013.

(3) Part Three: Plaintiff fell within a class of persons that such regulations were designed to protect

Pleading Example: Plaintiffs would further show that John Doe fell within the class of persons that the above cited rules, regulations and laws were intended to protect, thus entitling Plaintiffs to adopt such laws as the standard of care for measuring Defendant's conduct. Thus, the Plaintiffs assert a claim of negligence per se asserting that as a matter of law the conduct of Defendant toward John Doe amounted to negligence.

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<sup>76</sup> Prior to September 30, 1990, see 42 CFR § 405.1124 (d) for skilled nursing facilities and 42 CFR § 442.319.

#### **(4) Part Four: Causation and Damages:**

Pleading Example: One or more of the above cited violations of law was a proximate cause of the catastrophic injuries, death and resultant damages. Such damages are set for below in more detail.

#### **D] PLEADING BREACH OF FIDUCIARY DUTY AND GOOD FAITH AND FAIR DEALING DUTY**

Pleading Example:

- o By virtue of the nature of the services rendered by Loving Arms Nursing Home to John Doe as well as the huge disparity of power and unequal bargaining position existing between John Doe and all your Defendants, said Defendants occupied a position of confidence toward said patient which required fidelity, loyalty, good faith and fair dealing on their respective parts.
- o Such fiduciary duty grew out of the special relationship between John Doe and each respective Defendant.
- o Defendants breached their respective fiduciary duties and duties of good faith and fair dealing to John Doe as detailed more specifically in Plaintiff's Cause of Action for Negligence, Negligence Per Se and Deceptive Trade Practice which for descriptive purposes are incorporated herein as if fully set forth.
- o As a proximate cause of the foregoing breaches of duty, John Doe suffered injuries detailed hereinabove, death and damages described in more detail below.

Caveat: Plaintiff's counsel needs to be aware that this cause of action will most assuredly draw a special exception and/or summary judgement due to the fact the breach of a fiduciary duty and/or breach of a duty of good faith and fair dealing duty has not yet been recognized as a cause of action in a nursing home maltreatment case. The defendant will attempt to restrict this theory of recovery, arguing that the duty of good faith and the fiduciary duty is limited to such areas as insurance, oil and gas contracts, partnerships and joint ventures wherein the plaintiff has relied upon defendant's good faith in negotiating financial interests, often outside the plaintiff's control. In contrast, defendant will urge, a health care provider does not invest or negotiate a patient's interest, but rather

the relationship in question is one of providing a service which may be discontinued or refused by the patient at will.

Because of the risk associated with an unrecognized theory such as this, counsel should plead this theory in conjunction with a recognized cause of action such as negligence. The reader should further note that the specific manner and means of the breach are not detailed within the pleading example above, but rather are incorporated from the negligence, negligence per se and deceptive trade practice causes of action.

## **E] PLEADING GROSS NEGLIGENCE AND MALICE**

Three points need to be made with respect to gross negligence/malice pleadings in the nursing home maltreatment case.

### POINT ONE:

This portion of the pleading focuses upon the degree of defendant nursing home's culpability in failing to provide the required care to plaintiff. Clearly, the primary purpose of gross negligence or malice pleadings is to lay the foundation for plaintiff's claim for exemplary damages.<sup>77</sup> This segment of the petition is influenced by the legal requisites for the recovery of exemplary damages which are established in each jurisdiction. Of course, plaintiff's counsel should consult the applicable authority to determine the legal prerequisite for recovery of these types of damages.

### POINT TWO:

Generally, the level of culpability which must be reached in order to hold a nursing home responsible for exemplary damages requires plaintiff to establish one or more of the following:

- a) Defendant was aware of relevant care deficiencies affecting other residents prior to plaintiff's admission and chose to ignore them;
- b) Defendant was aware of relevant care deficiencies affecting other residents during plaintiff's residency and chose to ignore them; and/or

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<sup>77</sup> For an in-depth treatment of legal and factual criteria applicable to a claim for exemplary damages in a nursing home case, see Chapter 4, *TITLE OF CHAPTER FOUR*.

- c) Defendant was aware before and/or during plaintiff's residency of relevant care deficiencies and was aware of such deficiencies even after plaintiff's discharge and chose to ignore all such problems;
- d) Although there were no widespread deficiencies affecting other residents of which Defendant was aware, the neglect of plaintiff was so outrageous and longstanding in nature that it could not have escaped Defendant's attention. With respect to the same, Defendant chose to ignore it.

Sample pleadings of these operative facts are provided below.

POINT THREE:

Finally, another purpose for this portion of the pleading is to enhance:

- a) the admissibility of evidence of prior deficiencies at defendant nursing home relevant to plaintiff's condition and needs;
- b) the admissibility of evidence of relevant care deficiencies pertaining to other residents which occurred while plaintiff resided at defendant nursing home; and
- c) to enhance the admissibility of relevant care deficiencies occurring after plaintiff was discharged from defendant's facility.

The following pleadings have been designed to maximize the admissibility of evidence pertaining to widespread care problems at the defendant nursing home which involve residents other than plaintiff and occur at times before and/or after plaintiff's residence at said facility.

**(1) Part One: Conscious indifference and malice by defendant.**

Pleading Examples:

- o The wrongful conduct of Defendant set forth in CAUSES OF ACTION ONE, TWO, and FOUR which was undertaken without regard to the health and safety consequences of those patients such as John Doe entrusted to its care, amounted to gross negligence in that Defendant evinced such little regard for its duties of care, good faith and fidelity owed John Doe as to raise a belief that the acts and omissions set forth above were the result of conscious indifference to the rights and welfare of John Doe.
- o Such conclusion is grounded in the fact that Defendant was aware of widespread care deficiencies before, during and after the residency of

John Doe, and refused to implement adequate measures to correct and prevent the persistent recurrence of the same. Moreover, Defendant was aware, before, during and after the residency of John Doe, that these care deficiencies posed a threat to residents who, like John Doe, were particularly dependent and in need of basic nursing care and assistance with activities of daily living.

- o Refusal to implement preventive strategies despite awareness of relevant problems.

Pleading Example: More specifically, before the admission of John Doe to Loving Arms Nursing Home, Defendant had been notified of widespread care deficiencies by at least the following sources: employees of Loving Arms Nursing Home; relatives of residents at Loving Arms Nursing Home; and the Texas Department of Health. Texas Department of Health reports and complaints filed in July and August of 1989 cite such glaring care deficiencies as: (list)

- o More specifically, defendant was notified of widespread deficiencies prior to plaintiff's admission to the nursing home.

Pleading Example: The same problems which beleaguered the care of residents at Loving Arms Nursing Home prior to John Doe's admission continued to plague residents, including John Doe, from November 25, 1989, through January 9, 1990. The inhumane treatment and persistent neglect, as described above, which caused injury to John Doe, was merely a continuation of the reckless disregard for residents which was displayed prior to John Doe's arrival at Loving Arms Nursing Home.

**(2) Part Two: Unmotivated by frequent harm occurring to its residents.**

Pleading Example:

- o Not even the tragic injuries suffered by John Doe provided Defendant with sufficient motivation to correct the long-standing and widespread care deficiencies at Loving Arms Nursing Home. **Two weeks** after John Doe's discharge from the facility, inspectors from the Texas Department of Health found the following recurrent and repetitive problems:
  - o Care necessary to prevent skin breakdown was not provided to residents.
  - o Residents did not receive all treatments, medications and diets as prescribed by the physicians.

- o Physicians were not notified of significant changes in residents' conditions.
- o During rounds on 1-27-90, seven of 22 residents were noted to have skin excoriation with no documentation that the physician had been notified.
- o During rounds on 1-27-90, three of seven residents were observed to have decubitus, physician had not been notified of the decubitus.
- o Documentation did not reveal that a resident was receiving Granulex spray to buttocks every shift and Elase Chloromyectin to right hip until debrided as ordered on 1-18-90 for a nickle-sized Stage III and a quarter-sized Stage IV with eschar tissue to the outer right hip and a Stage II quarter-sized decubitus to the inner right buttock.
- o Another resident was to receive Elase Chloromyectin until areas were debrided, but had a treatment sheet with 15 of 31 treatments not documented as having been completed. This resident had at least 11 decubitus ranging from Stage II to Stage IV, from dime-sized to three inches in diameter.
- o Seven of seven residents observed to have decubitus during rounds on 1-27-90 revealed documentation did not accurately identify, assess and indicate progress.
- o Review of incident/accident reports did not reveal that physicians and/or responsible parties were notified of the same.
- o Not even the above report by the Texas Department of Health motivated Defendant to initiate corrective strategies for the benefit of its residents. Five weeks after John Doe had been discharged from the facility and a full two weeks after the TDH investigation and findings (set forth in part above), the Texas Department of Health returned to Loving Arms and found that the same deficiencies cited in August, 1989 remained uncorrected. Patients still were not receiving basic nursing care. More specifically, the following deficiencies noted before, during and after John Doe's residency at Loving Arms Nursing Home were enumerated yet again:
  - o At least 11 out of 20 dependant residents were found to be in need of positioning with a lack of adequate skin padding to prevent skin breakdown;

- o Call lights were not accessible to recipient patients;
- o Nurses' notes were not reflective of observed patient conditions, medical conditions and changes; and follow-ups to medical changes and routine documentation was lacking;
- o Charge nurses failed to recognize significant changes in conditions of recipient patients and take necessary action. These significant changes were not promptly reported to the attending physician;
- o At least 27 residents were found to be dirty, with unmet grooming needs.
  
- o The long chronology of substandard care at Loving Arms, reported by employees and families of residents, and documented by the Texas Department of Health, coupled with the continuous lack of response on the part of management to correct the same, provides a clear indication of the facility's flagrant disregard for the well-being of helpless residents under its exclusive care. This lack of regard is further based upon the misleading and deceptive conduct by Defendant, set forth in paragraph 32, which was perpetuated in an effort to maintain and increase the rate of occupancy at Loving Arms Nursing Home.
  
- o By reason of such conduct Plaintiffs are entitled and therefore assert a claim for punitive damages in an amount sufficient to punish and deter Defendant and other like it from such conduct in the future.

## F] PLEADING DECEPTIVE TRADE PRACTICES

### **(1) PART ONE: LEGAL STATUS OF PLAINTIFF**

Pleading Example - Medicaid Recipient: At all material times John Doe occupied the status of a "consumer" within the definition of § 17.45 of the Deceptive Trade Practices Act in that goods and services were sought from Corporate Defendants by John Doe, by his family on behalf of said resident, and by the Texas Department of Human Services [TDHS] on behalf of the said John Doe. Further, at all times material to this lawsuit Plaintiff's family was acting for and on behalf of John Doe and Corporate Defendants had actual knowledge that John Doe was the actual beneficiary of the transaction. Accordingly, John Doe was the beneficiary of representations made by Corporate Defendants to TDHS and its agent TDH, regarding the quality of care provided by Loving Arms Nursing Home and its continuing compliance with the rules and regulations promulgated by TDH and TDHS. Moreover, John Doe was the beneficiary of certain oral representations and express warranties made to his family by said Defendants regarding the quality and scope of services that would be provided to John Doe at Loving Arms Nursing Home. As stated previously, it was on the basis of these representations that Plaintiffs selected Loving Arms Nursing Home and submitted John Doe into its care, control and custody.

### **(2) Part Two: Specific Representations by Defendant**

There are at least four sources of evidence for establishing the representations, claims and advertisements of defendant about the quality of care provided by defendant facility to its residents -- 1) the family, legal guardian or responsible party of the victim; 2) the victim (in most cases, this potential source will not yield evidence due to the mental incapacity of the victim or death); 3) the written representations by the nursing home to the public; and 4) written claims made by the defendant nursing home to the government with respect to said victim about the care capabilities of the facility as well as the actual care which said defendant warranted was provided to said victim. Examples of common representations which are actionable in the context of a deceptive trade practice theory are set forth below.

Pleading Example - Source 1: Oral Representations to Family or Victim:

- o Representing to John Doe and his family that the staff at Loving Arms Nursing Home could and would provide for the special care needs of John Doe, when in fact it could and did not;

- o Representing to John Doe and his family that the staff at Loving Arms Nursing Home that John Doe would be provided "loving care" while a resident of said facility, when in fact it did not;
- o Representing to John Doe and his family that Loving Arms Nursing Home was adequately staffed with competent and trained persons and that the quality of services to be rendered would be superior, when in fact it was not;

Pleading Example - Source 2: Written Representations to Public:

Defendant, in an effort to induce Plaintiffs into submitting their mother for care at Loving Arms Nursing Home and to persuade them to allow their mother to remain at said facility, made the following representations and claims by way of brochures, statements of philosophy, Yellow Pages advertisements, billboards, newsletters, and posted certificates of membership in state and national nursing home associations:

- o "Loving Arms Nursing Home is dedicated to providing residents the **best health care and lifestyle available**. Warm and wonderful surroundings are augmented with well-trained, professional staff and the necessary equipment to ensure each resident is well cared for in the most complete and persona manner possible."
- o "Providing care which meets the **highest standards** is always our goal."
- o "Our staff is dedicated to providing the **finest medical** care and professional nursing available."
- o "...**your safety and happiness** while a resident here [Normandy Terrace] are of utmost importance to us."
- o "We believe that the maintenance of human dignity is vital to good health care."
- o "...the service we render should demonstrate our belief in the dignity and worth of every individual and his rights for physical, mental, emotional and spiritual needs. We hope to provide a home-like, cheerful, friendly and hopeful atmosphere, so that we may contribute to the preservation of the personal integrity of each individual."
- o "The Nursing staff provides twenty-four hours nursing service sufficient to meet the nursing needs of all residents."

- o "Should a resident require nursing care which the Administration deems as care which cannot be adequately provided by the staff of this Center, assistance will be given in locating another center for the resident."
- o "If a service needed is not available, the resident will not be admitted, or will be transferred to a facility where the treatment or service is provided."

Pleading Example - Source 3: Claims to Governmental Agencies:

- o Representing and warranting to TDH and TDHS that the "prescribed physical and medical care" for John Doe could be adequately provided by Loving Arms Nursing Home when in fact it could not by reason of those deficiencies described in paragraphs above;
- o Representing and warranting to TDH and TDHS that Loving Arms Nursing Home maintained an organized nursing service for its patients which was composed of sufficiently qualified personnel to provide adequate and properly supervised care during all hours when in fact it was not;
- o Representing and warranting to TDH and TDHS that nurses at Loving Arms Nursing Home were competent to and would observe, recognize, record and report to the attending physician of residents at said facility which included John Doe sudden and/or severe changes in the signs, symptoms and/or conditions of any such resident, when in fact, certain nurses at Loving Arms Nursing Home were not competent to and did not observe, recognize, record and report such changes;
- o Representing and warranting to TDH and TDHS that Loving Arms Nursing Home would provide and maintain rehabilitative nursing services for John Doe, i.e. good body alignment, proper positioning, exercising of bedfast residents, the use of protective devices and proper skin care for John Doe, when in fact it did not;
- o Representing and warranting to TDH and TDHS that Loving Arms Nursing Home would encourage and help John Doe to change positions at least every two hours day and night and as prescribed by his attending physician in order to stimulate circulation and discourage decubiti and deformities, when in fact it did not;
- o Representing and warranting to TDH and TDHS that Loving Arms Nursing Home would provide John Doe access to a nurse call device and make accessible to Mr. Doe the call cord, when in fact it did not;

- o Representing and warranting to TDH and TDHS that Loving Arms Nursing Home would provide and implement a nursing care plan based on John Doe's problems and needs which contained long-term goals, short-term objectives and approaches to meet such needs and would be reviewed and revised when John Doe's needs changed, when in fact it did not;
- o Representing and warranting to TDH and TDHS that Loving Arms Nursing Home would provide nursing care to John Doe consistent with the orders of his attending physician, when in fact it did not;
- o Representing and warranting to TDH and TDHS that Loving Arms Nursing Home would provide daily baths to John Doe and would appropriately clean him after each incontinent episode, when in fact it did not;
- o Representing and warranting to TDH and TDHS that Loving Arms Nursing Home would discharge John Doe from Loving Arms Nursing Home when the needs of Mr. Doe could not be met through service from the facility staff, when if fact it did not;
- o Representing and warranting to TDH and TDHS that while John Doe was a resident at Loving Arms Nursing Home, Defendant would maintain compliance on a continuing basis with all standards of participation as promulgated by TDHS when in fact it did not;
- o Representing and warranting to TDH and TDHS that where deficiencies in care were determined to exist by TDH at Loving Arms Nursing Home it would correct the same, when such deficiencies were not corrected.

### **(3) PART THREE: PRODUCING CAUSE<sup>78</sup>**

Example: Such false, misleading and deceptive acts were the producing cause of injuries and death suffered by John Doe and the damages which are described in more detail below.

### **(4) Part Four: Treble Damage Predicate**

Example: Further, Plaintiffs would show that the above deceptive and misleading acts were knowingly committed by Defendant with actual awareness of the deceptive nature of the act or practice giving rise to the claims set forth herein. Accordingly, Plaintiffs may be awarded treble damages pursuant to the DTPA, for which sum Plaintiff prays for hereinbelow.

## **G| PLEADING FRAUD**

### **(1) Part One: Fraudulent Representation to Family of Victim**

Examples:

- o Further, Loving Arms Nursing Home through deception, artifice and circumvention successfully defrauded Plaintiffs. Plaintiffs trustingly submitted Mr. Jones for care at said facility on the basis of the following explicit and implicit representations: a) that it would comply on a continuing basis with those licensure requirements, regulations, laws and professional standards designed to assure that nursing home resident received safe and adequate care; b) that it would adequately staff its nursing home and employ competent and adequately trained employees; c) that it would provide high quality professional care and would truthfully document the condition of John Jones and the care rendered to his; and, d) that it would immediately notify your Plaintiffs if John Jones's needs eclipsed the care capabilities of said nursing home and would no longer accept his as a resident at the facility, in such case.
- o During John Jones's residency at Loving Arms Nursing Home, Defendant continually promoted and disseminated the above representations and information which would lead the Plaintiffs and other similarly situated consumers to believe the same were true.

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<sup>78</sup>The legal terminology and criteria for causation in a deceptive trade practice action differs from state to state. Counsel is encouraged to consult the relevant statutes in his/her jurisdiction. For an excellent source manual, see *Unfair and Deceptive Acts and Practices* Cumulative Supplement 1988, National Consumer Law Center, 11 Beacon Street, Boston, Massachusetts 02108.

- o Loving Arms Nursing Home purposefully disseminated such representations and promoted itself in a manner consistent with the foregoing claims in order to induce Plaintiffs and others like them into placing their relatives in the exclusive custody and control of Loving Arms Nursing Home, and once there, allowing said patients to remain.

## **(2) Part Two: Reliance by Family of Victim**

- o Your Plaintiffs relied upon these explicit and implicit claims in selecting Loving Arms Nursing Home as a place of residence for John Jones and continuing to allow him to remain at said facility.

## **(3) Part Three: Fraudulent Representations to Government**

- o At all times material to this suit, Loving Arms Nursing Home was aware that the Texas Department of Health [TDH] was responsible for monitoring the adequacy of care at said facility, including that care provided to John Jones. Further, Defendant was aware that TDH was authorized to close the Loving Arms Nursing Home if care was so inadequate as to pose an immediate threat to the health and safety of residents as well as recommend that payment be withheld for care rendered to Medicaid residents such as John Jones.
- o Defendant was also aware that your Plaintiffs would not have selected nor allowed John Jones to remain in the Loving Arms Nursing Home facility unless the State of Texas, to wit: TDH, had approved the adequacy of care at said nursing home.
- o In an effort to mislead the State of Texas, to wit: TDH, and ultimately your Plaintiffs and similarly situated consumers, Loving Arms Nursing Home falsified the nursing home records of John Jones and other nursing home residents, and impaired the verity of records required by law to be maintained by the facility regarding the care provided to such residents and its capabilities to provide the same.
- o More specifically, Loving Arms Nursing Home misrepresented in the medical record of John Jones and other records required by law to be maintained by Loving Arms Nursing Home that: a) John Jones was turned and repositioned every two hours as documented; b) John Jones was adequately cleaned as documented; c) John Jones was provided skin care as documented; d) John Jones was bathed and provided incontinent care as documented; e) John Jones was checked and monitored as documented; f) John Jones was provided decubitus care and treatment as documented;

and, g) that Loving Arms Nursing Home continually complied with the requirements of law on a continuing basis in caring for John Jones.

- o In addition thereto, Loving Arms Nursing Home misrepresented: a) the quality and professional nature of the care it provided; b) the level of competency of its staff; c) the adequacy of quantity of nursing personnel employed to care for residents such as John Jones on the skilled wing of the Loving Arms Nursing Home facility; and, d) that it was capable of adequately care for John Jones when in fact, it was not by reason of the failures specifically detailed in CAUSE OF ACTION ONE AND TWO, above.

#### **(4) Part Four: Knowledge of False/Baseless Claims and Effect of Same**

- o At the time such misrepresentations and false documentation occurred, Loving Arms Nursing Home knew the same were false or made such affirmative claims of service and care without knowledge of their truth. Moreover, the above described conduct was undertaken in order to conceal the true picture of care that was being provided to John Jones and other similarly situated residents.
- o Loving Arms Nursing Home was aware that if Plaintiffs learned of the true circumstances and facts of John Jones's case, they would remove him from the facility. Furthermore, said facility was aware that if the Texas Department of Health learned the true care provided on a continual and regular basis, it would immediately close the facility.

#### **(5) Part Five: Causation**

- o Loving Arms Nursing Home fraudulently concealed its inability to care for John Jones according to the accepted community standards, and the standards required by law. Loving Arms Nursing Home continued to misrepresent to Plaintiffs and family of Mr. Jones that it was meeting those standards; thereby causing your Plaintiffs to leave John Jones in Loving Arms Nursing Home's care.

Example: As a proximate result of Garden's fraudulent misrepresentations and fraudulent concealment of the true care services provided to John Jones, TDHS was induced into paying your Corporate Defendants for care services that were not rendered and for unprofessional and inadequate care. Further, as a proximate result of Defendants' fraudulent misrepresentations and concealment Plaintiffs continued John Jones in Loving Arms Nursing

Home's care which proximately resulted in the injuries alleged hereinabove and damages described more specifically below.

## H] ADVANTAGES TO PLEADING BREACH OF CONTRACT

In order to participate in the Medicaid program as a provider, a nursing home must enter into a contract with the state agency responsible for administering the Medicaid program. As part of the contract the nursing home covenants that it will comply on a continual and ongoing basis with the rules and regulations promulgated by the aforementioned state agency. Furthermore, the nursing home contracts with said state agency to correct all deficiencies in a timely manner. These contractual provisions set the stage for a cause of action for breach of contract in a case involving a nursing home which has long-standing history of deficiencies relevant to the injuries sustained by plaintiff. The primary benefit of this cause of action derives from the evidentiary latitude afforded plaintiff in proving the breach. In such case, the breach hinges upon proof of prior deficiencies thus providing plaintiff a foothold from which to argue that the historical deficiencies constitute admissible evidence in this cause of action. Accordingly, counsel should weigh the potential evidentiary benefits of this cause of action in drafting plaintiff's petition.

### **§ 1.08 -- Key Request For Production and Interrogatories**

#### **A] INTRODUCTION**

This section discusses specific Requests for Production (RFPs) and Interrogatories that have been successfully employed by this author as part of a comprehensive discovery plan in past nursing home cases. Specifically discussed below are some of the key RFPs and Interrogatories which we frequently serve upon a nursing home defendant as part of the initial discovery in the case [Plaintiff's First Request for Production and First Set of Interrogatories]. With respect to the RFPs, twelve categories of documents are sought as part of plaintiff's initial discovery efforts. These twelve categories appear in bold face type in the subsection which immediately follows. With respect to the Interrogatories served upon defendant, plaintiff initially seeks answers which go to the heart of the case as: 1) the specific employees, including aides and orderlies, who cared for plaintiff; 2) the specific measures undertaken to prevent plaintiff's injuries; 3) the evolution, extent and severity of each injury from admission to discharge; 4) each date the attending physician for plaintiff was notified about plaintiff's condition at the nursing home; 5) all care and treatment provided to plaintiff's injury by defendant's staff; 6) all individuals having knowledge of facts relevant to the lawsuit; 7) any in-house investigation conducted by defendant in the normal course of business.

## **B] DOCUMENTS AND TANGIBLE THINGS TO BE PRODUCED**

The following are examples of RFP's grouped by category:

### **1. INSURANCE AGREEMENTS AND POLICIES**

- o All insurance agreements and/or policies, in their entirety which afford protection to Loving Arms Nursing Home for the acts and omissions set forth by Plaintiff in the above entitled and number cause including, but not limited to, primary, umbrella and excess policies, which may obligate any respective insurance company to satisfy part or all of a judgment which may be rendered in this action against the Defendant.
- o All insurance agreements and/or policies in their entirety which afford protection to any member of the governing body of Loving Arms Nursing Home for any act or omission, including but not limited to, primary, umbrella and excess policies, which may obligate any respective insurance company to satisfy part or all of a judgment which may be rendered in an action against any member of the governing body, arising out of the acts or omissions of any such member.
- o All insurance agreements and/or policies, in their entirety which pertain to any management company engaged by you to operate Loving Arms Nursing Home including, but not limited to, primary, umbrella and excess policies, which may obligate any respective insurance company to satisfy part or all of a judgment which may be rendered in an action against the said management company arising out of its acts or omissions.

### **2. CHARTS, DOCUMENTS AND PHOTOS PERTAINING TO PLAINTIFF**

- o Any and all clinical records, charts and documents, as such term is defined herein, pertaining to the care and treatment provided to John Doe while a resident of Loving Arms Nursing Home, which you have not previously tendered to Plaintiff's attorney.

This request includes but is not limited to all documents which are required to be created and maintained by you in accordance with the regulations promulgated by the Texas Department of Human Services, 40 T.A.C. §16.3903 "Medical Records," and the Texas Department of Health 25 T.A.C. §145.20 "Medical Record." Further any document created by you concerning the aforementioned resident, whether or not such record is normally maintained as part of the "nursing home chart," is requested.

Due to the fact that the documents requested contain information recorded in various colors of ink that cannot be legibly recopied on normal copy settings, you are hereby requested to produce the

original document or to furnish a complete and unaltered copy of the same which is totally legible. Illegible documents tendered in the past must be reproduced in accordance with the above condition.

- o If an in-house investigation was conducted by or on behalf of the defendant in the ordinary course of its business, subsequent to the occurrence in question and before the defendant received formal notice of this lawsuit, relating to the occurrence in question or the subject matter of this lawsuit (including the plaintiff's claim for damages) provide any and all documentation relating to such investigations including but not limited to:
  - o All documents, drawings, films, models or other items generated or obtained by or on behalf of the defendant, which are relevant or contain information relevant to:
    - o the cause of the occurrence in question.
    - o the injuries allegedly sustained by the plaintiff.
    - o the defendant's affirmative defenses to the plaintiff's cause of action.
  - o All statements obtained by or on behalf of the defendant.
  - o All physical and/or tangible items and/or potentially usable evidence obtained by or on behalf of the defendant from the scene of the occurrence in question.
- o Any quality assurance report, study, complaint or incident investigation, or investigation of alleged substandard care or abuse which in any way refers to or concerns John Doe.

### **3. ADVERTISEMENTS, REPRESENTATIONS, CLAIMS AND MARKETING STRATEGIES**

- o Any and all advertisements, representations or other documentation made available to the public by you during the period December 1, 1988 through April 1, 1990 which contain claims about the quality, characteristic, type and standard of care provided to the residents at Loving Arms Nursing Home or the approved status of said facility.

This request includes but is not limited to all brochures; yellow page advertisements; newspaper advertisements; statements of care philosophy; statements of policies or care objectives; billboard advertisements; magazine advertisements; flyers; marketing materials; statements, representations and claims about the type of care provided residents of your facility or the approved status of your facility made in connection with any event sponsored by you;

or any other documentation created to promote Loving Arms Nursing Home.

- o Any "contact list" or document which contains the names of physicians, hospital case workers, hospital discharge planners, home health agencies, or any other person responsible for assisting with the placement of any patients in a nursing home that you contacted in order to obtain new residents for Loving Arms Nursing Home.
- o Copies of all documents evidencing membership by you or Loving Arms Nursing Home in any national, state or local nursing home association or organization such as the American Health Care Association, the Texas Nursing Home Association, or the Texas Health Care Association.

This request includes any certificates of membership, letters of good standing, applications by you, membership cards, plaques, or proof of membership.

- o Copies of all documents in your possession or control containing:
  - o the statement of care philosophy by any national, state or local nursing home association which you or Loving Arms Nursing Home are a member.
  - o the bylaws of the aforementioned organization/s.
  - o any ideals, goals or objectives espoused by the aforementioned organization/s or associations relating to the care provided to residents.
  - o a statement of the quality, characteristics, type and standard of care desired and embraced by such organization/s and its members.
  - o statements of policies governing the aforementioned association or organization membership.
  - o statements pertaining to the care that members provide and care objectives.
  - o any information that is provided to members for distribution to the public such as brochures, flyers, cards or any other form of advertisement.
- o Any document which addresses the subject of how to increase patient occupancy at Loving Arms Nursing Home.

This request includes but is not limited to any document containing Defendant's marketing strategy, goals, objectives or tactics.
- o Any statement representation, promise, claim made by you to any government agency as to: a) the ability of Loving Arms Nursing Home to adequately provide for the needs and care for John Doe or residents of Loving Arms Nursing Home in general; b) the adequacy of care provided

John Doe; c) the compliance by Loving Arms Nursing Home with all terms of its provider contract with the Texas Department of Human Services or any rules, regulations or laws mandating the quality of care to be provided to any resident including John Doe.

#### **4. FACILITY POLICIES AND PROCEDURES**

- o All Resident Care Policies, Procedures and Manuals of Loving Arms Nursing Home that were in effect from: a) December 1, 1988 to November 24, 1989; b) November 25, 1989 to January 9, 1990; and c) January 10, 1990 to April 1, 1990.

This request includes but is not limited to documentation that sets forth policies and procedures in the following areas: 1) admission, transfer and discharge of residents; 2) physician services; 3) dental services; 4) dietary services; 5) nursing services; 6) pharmacy services; 7) social services for residents; 8) activities for residents; 9) ancillary diagnostic and therapeutic services (such as laboratory, radiology, and physical therapy); 10) medical records; 11) emergency medical/health care; 12) disaster plan; 13) infection control.

For purposes of this request, it shall be sufficient to provide an unsegregated document so long as the dates for each policy contained therein appears on it as required by 25 TAC §145.13(b)(4) and 40 TAC §16.1902. Additionally, with respect to any policy that has been revised or updated, you are requested to produce the original version, prior to change. In the event that the policies do not contain a date as required by law, you are requested to produce a true and accurate copy of said policy on the date of Nov. 24, 1989. In addition, any changes, updates or modifications to the aforementioned policy after Nov. 24, 1989 shall be produced separately.

- o If not produced above, request is made herein for any and all procedures, policies and guidelines regarding the prevention, proper care and treatment of pressure sores, including but not limited to all documentation which describes the steps to be taken by nursing and/ or dietary personnel of Loving Arms Nursing Home to:
  - o identify those patients in the facility at higher risk for the development of pressure sores.
  - o measure through implementation of a risk assessment tool, the risk and susceptibility of patients at Loving Arms Nursing Home for pressure sore development, at time of admission and at periodic intervals thereafter.

- o prevent the development of pressure sores.
- o formulate, modify and update as the condition of the patient requires, a plan of care for the prevention, proper care and treatment of pressure sores.
- o assure that the status of existing decubitus ulcers improves and progresses toward healing, and in fact heal, rather than deteriorate.
- o assure that pressure sores remain clean and free of infection and necrosis.
- o assure that the nutritional intake of patients with pressure sores is modified as needed in order to promote wound healing through recognition of the increased calorie intake.
- o assure that necessary and ongoing assessments are conducted of any pressure sore and fully documented.
- o assure that required and necessary care/ treatments of any pressure sore is accurately documented.
- o assure that the attending physician for any patient with a pressure sore is notified of any significant change of condition in the wound on a timely basis.
- o monitor the incidence, severity, improvement and worsening of pressure ulcers at Loving Arms Nursing Home; evaluate the adequacy of the pressure sore prevention program and Loving Arms Nursing Home; and evaluate the adequacy of care and treatment of pressure sores.
- o All guidelines and procedures utilized by you or in your possession, custody or control, for determining whether Loving Arms Nursing Home had sufficient number of nursing personnel which includes registered and licensed vocational nurses, nurse assistants, medication assistants, orderlies and other staff to: 1) provide 24-hour nursing services; 2) meet the needs of residents who are admitted to and remain in the facility; 3) meet the total nursing needs or recipient-patients.
  - This request includes but is not limited to any documentation which sets forth guidelines or criteria for measuring workload imposed or nursing personnel. If any revisions, updates or modifications of the above described guideline have occurred between the dates of Dec.1, 1988 and April 1, 1990, you are requested to produce the original version and all subsequent revisions.
- o All written guidelines, policies, and procedures of Loving Arms Nursing Home regarding the establishment, methodology, and implementation of any quality assurance program, study, or evaluation.

This request includes but is not limited to all documentation describing or defining the establishment, implementation and methodology for: 1) health care reviews; 2) in-depth assessment of the quality and quantity of health care service; 3) health care evaluation studies; or 4) any study, inquiry or measure to be implemented at Loving Arms Nursing Home in order to examine a specific problem, patterns in patient outcomes, or to evaluate the quality of any aspect of health care rendered. If any revisions, updates or modifications of the above described guideline have occurred between the dates of Dec.1, 1988 and April 1, 1990, you are requested to produce the original version and all subsequent revisions.

## **5. TREATISES**

- o All treatises, scientific works, texts, books, manuals, periodicals, pamphlets, clinical or revising journals, trade journals, or documentation of any kind including slides, video presentations or film under the control of Loving Arms Nursing Home or you during the time frame specified in the above instructions which deal with the following subject matter:
  - o the method for identifying and classifying patients in the facility who are at higher risk for the development of pressure sores.
  - o utilization of risk assessment tool to identify patients at risk for the development of pressure sores.
  - o the prevention of pressure sores.
  - o the importance and/ or the appropriate plan of care for the prevention and proper care of pressure sores.
  - o the need for modification and update of the plan of care: 1) as the risk for pressure sores increases; 2) as the needs of the patient change; 3) and as the condition of the sore worsens or remains unchanged.
  - o the proper care of treatment of existing pressure sores.
  - o the proper care and treatment of infected and necrotic pressure sores.
  - o the link between infected decubitus ulcers and septicemia (blood borne infection).
  - o life threatening danger presented by decubitus ulcers in the elderly.
  - o importance of nutritional intervention (increased caloric and protein intake) in wound healing and the prevention of decubitus ulcers.

- o documentation of pressure sores including any standards or guidelines published by any professional organization or authority which sets forth the method for accurately describing the condition of any dermal wound or pressure sore.
- o the development of a pressure sore quality assurance program for purposes of monitoring the incidence, severity, improvement and worsening of decubitus; evaluating the adequacy pressure sore prevention and evaluating the adequacy of care and treatment of pressure sores.
- o All treatises, scientific works, texts, books, manuals, pamphlets, periodicals, clinical or nursing journals, trade journals or writings of any kinds utilized by you or in the control of Loving Arms Nursing Home during the time frame specified in the above instructions, including the following:
  - o Any instructional text, manual, guide, pamphlet or other writing for nurse assistants or supervising staff which explains the function, responsibilities, duties, fundamental skills and procedures to be performed by nurse assistants.
  - o Any geriatric nursing or medical treatise, text, periodical, journal, dissertation or writing of any kind.
  - o All nursing texts, treatises, manuals of practice, medical surgical nursing texts, fundamental nursing texts, or any nursing periodicals and journals.
  - o If not produced under one of the above requests, request is specifically made herein for all rehabilitative nursing texts, treatises, manuals, periodicals or writings of any kind.
  - o If not produced under one of the above requests, request is specifically made herein for all nursing process and nursing care planning texts, manuals, guides, or writings of any kind.
  - o If not produced under one of the above requests, request is specifically made herein for all nursing codes, nursing standards, standards of gerontologic nursing practice, or rehabilitative standards.
  - o All quality assurance texts, treatises, manuals, workbooks, guides or writings of any kind for auditing the performance of nursing personnel; detecting inadequate nursing care; identifying patterns in patient outcome and care; and evaluating the adequacy of care and treatment rendered.
  - o All risk management, risk avoidance, and risk aversion texts, manuals, workbooks, literature, or writings or any kind.

- o All texts, manuals, guides, treatises, workbooks, literature, or writings of any kind on the subject of the Nursing Home Administrator. This request includes any document explaining the function, duties, management responsibilities, methods for assuring compliance with regulations and policies, and actions necessary for the discharge of the responsibilities of the Nursing Home Administrator.
- o All texts, manuals, guides, treatises, workbooks, literature, or writings of any kind on the subject of the nursing home Director of Nurses. This request includes any document explaining the function, duties, management responsibilities, methods for assuring compliance with regulations and policies, and actions necessary for the discharge of the responsibilities of the nursing home Director of Nurses.
- o All trade journals, nursing home magazines, publications from the American Health Care Association, Texas Health Care Association, or the Texas Nursing Home Association received by Loving Arms Nursing Home or in your possession or control which were published during the time frame specified in the above Instructions.

#### **6. SCHEDULES, ASSIGNMENTS, AND EMPLOYEE'S PERSONNEL FILES**

- o All work schedules and timesheets showing the identity, number (quantity), and classification (e.g. L.V.N., R.N., nurse aide, etc.) of any nursing personnel, as such term is defined above, for each tour of duty, including relief or pool personnel, who worked on any unit or wing in Loving Arms Nursing Home where John Doe resided from November 25, 1989 to January 9, 1990.
- o Any document maintained by you or under your control containing the last known address and/or telephone number of any employee of Loving Arms Nursing Home between the dates of December 1, 1988 to April 1, 1990.

This request includes any document whether written or electronically stored which contains information as to the last known location and telephone number of any employee of Loving Arms Nursing Home between the dates of December 1, 1988 through April 1, 1990, including any Director of Nurses, Administrator, or person having any responsibility for the management of any department or aspect of Loving Arms Nursing Home.

- o Any and all documentation maintained or included in the personnel files of all registered nurses, (R.N.s), all licensed vocational nurses (L.V.N.s), any other nurses, nurse assistants, orderlies or medical assistants who worked at Loving Arms Nursing Home from November 25, 1989 to January 9, 1990 on any wing or unit where John Doe resided.

This request includes any kind of written, typewritten, printed or recorded material whatsoever, including, but without limitation, resumes, applications for employment, verification of credentials or qualifications, background check, research investigation, references, current telephone number and address, forwarding address, agreements concerning employment, contracts of employment or engagement, acknowledgement of liability, evaluations, reprimands, time cards, time sheets, schedules, notes, transcription of notes, memoranda, letters from any person including the employee or agent who is the subject of the file, telegrams, publications, pictures, tape recordings, video tapes, transcriptions of recordings, log book and business records which are collected and maintained for the above-identified employees in any file.

- o Any and all documentation maintained or included in the personnel files of all administrators and director of nurses who worked at Loving Arms Nursing Home from December 1, 1988 through April 1, 1990.

This request includes any kind of written, typewritten, printed or recorded material whatsoever, including, but without limitation, resumes, applications for employment, verification of credentials or qualifications, background check, research investigation, references, current telephone number and address, forwarding address, agreements concerning employment, contracts of employment or engagement, acknowledgement of liability, evaluations, reprimands, time cards, time sheets, schedules, notes, transcription of notes, memoranda, letters from any person including the employee or agent who is the subject of the file, telegrams, publications, pictures, tape recordings, video tapes, transcriptions of recordings, log book and business records which are collected and maintained for the above-identified employees in any file.

## **7. OWNERS, MANAGEMENT AND GOVERNING BODY**

- o Any documentation which discloses or contains the name of each person who directly or indirectly owns an interest of five percent (5%) or more in Loving Arms Nursing Home between the dates of December 1, 1988 through April 1, 1990.

- o Any document which discloses or contains the names of any and all members of the governing body for Loving Arms Nursing Home.
- o Any and all minutes or summaries from any meeting of the governing body of Loving Arms Nursing Home between the dates of December 1, 1988 to April 1, 1990.

## **8. ADVERSE FINDINGS, SANCTIONS OR RESPONSES**

- o Any and all documentation from the Texas Department of Health (TDH), Texas Department of Human Services (TDHS) or any other local, state or federal governmental agency which sets forth findings, conclusions, violations, deficiencies, penalties, actions and recommended sanctions regarding Loving Arms Nursing Home between the dates of a) December 1, 1988 to November 24, 1989; b) November 25, 1989 to January 9, 1990; and c) January 10, 1990 to April 1, 1990. This request includes but is not limited to any of the following documents under your control:
  - o Report of Contact And Summary (TDH Form X-68), including any other document prepared by The Long Term Care Unit Program Administrator or his designee outlining significant deficiencies found during licensure inspection, survey, inspection of care, and/or complaint investigation.
  - o Statement of Deficiencies and Plan of Correction (HCFA Form 2567).
  - o Skilled Nursing Facility Survey Report--Part B (HCFA Form 1539).
  - o Intermediate Facility Survey Report--Part B (HCFA Form 1539).
  - o Part A--Administrative Procedural Requirements Medicare/ Medicaid Survey Report (HCFA Form 525).
  - o Long Term Care Survey--Part B.
  - o Post Certification Revisit Report.
  - o Adverse Action Extract (HCFA Form 462).
  - o Federal Monitor Survey.
  - o Licensing Inspection Reports (TDH Form X-4).
  - o Administrative Penalty Report (TDH stock no. X-75).
  - o Administrative Penalty Review Report.
  - o Administrative Penalty Workbook.
  - o Any and all Findings of Fact, Conclusion of Law or Orders issued by the Commissioner of TDH.
  - o Receipts from TDH evidencing payment of any administrative penalty.
  - o Complaint investigation deficiencies including supporting narratives from investigators as well as any follow-up reports/findings.

- o Any narrative or similar paper written by a surveyor or inspector to further describe conditions found at the facility including reports of a special or non routine inspection.
- o Any other document not listed above which was created by TDH, TDHS or another governmental agency during its survey, licensure inspection, penalty investigation, incident investigation, follow-up visit or on-site inspection of Loving Arms Nursing Home such as:
  - 1) any field notes, list of violations or deficiencies, hand written notes or findings by inspectors or surveyors;
  - 2) any narratives or papers written to further describe conditions found to exist at Loving Arms Nursing Home by surveyors or inspectors;
  - 3) R.N. Tour Notes Worksheets;
  - 4) Tour Notes Worksheets (HCFA 251);
  - 5) Observation/ Interview Record-Review Worksheet;
  - 6) Discharge Records Analysis;
  - 7) Physical Environment Tour Notes Worksheet;
  - 8) Dining Area Eating Assistance Worksheet;
  - 9) Drug Pass Worksheet (HCFA Form 522);
  - 10) Drug Review Notes;
  - 11) Residents Selected for In-Depth Review;
  - 12) Pharmacy Record Review Summary

**9. INTERNAL INVESTIGATIONS, STUDIES, REPORTS, CORRESPONDENCE, OR OTHER RESPONSES**

- o Any and all documentation which was created as a part of (or which relates to) any internal investigation conducted by you or at your request, into conclusions or factual allegations about Loving Arms Nursing Home found in: a) any survey, licensure report, deficiency statement, violation, penalty, complaint narrative, incident investigation or any document requested under Request #1, above; or, b) any correspondence from TDH, TDHS or any other local, state or federal government agency notifying you of any adverse finding, conclusion, violation, deficiency, penalty, disciplinary action or recommended sanction.

This request includes any documentation created, received or under your control which records your efforts to uncover the relevant facts, the causes for, or the method and means of correcting any kinds of adverse finding, recommendation or sanction, related to the care provided at Loving Arms Nursing Home, issuing out of the Texas Department of Health, Texas Department of Human Services or a local, state, or federal governmental agency/subdivision. This request also includes: a) All documents, drawings, films, models or other items generated or obtained by or on behalf of the defendant, which are relevant or contain information relevant to: 1).any adverse finding, recommendation or sanction; 2) any injury allegedly sustained by any resident of Loving Arms Nursing Home; 3).any defenses or explanations to said adverse findings, recommendations or sanctions; b) All statements obtained by or on behalf of you c) All physical and/or tangible items and/or potentially usable evidence obtained by or on behalf of the defendant

This request seeks the above described documents for the following periods of time: a) December 1, 1988 to November 24, 1989; b) November 25, 1989 to January 9, 1990; and c) January 10, 1990 to April 1, 1990.,

- o Any and all documentation as such term is defined hereinabove, created by you, received by you, or in your control concerning complaints by any person about any of the following at Loving Arms Nursing Home from December 1, 1988 to April 1, 1990:
  - o the adequacy of patient care.
  - o the adequacy of nursing care or medical care.
  - o the quality or quantity of nursing personnel.
  - o the quality or quantity of non-nursing personnel.
  - o the adequacy of dietary services.

- o the quality of quantity or supervision of nurses, nurse assistants, or other nursing personnel.
- o the quality or quantity of nursing supplies, linens or equipment.
- o the availability of physical therapy.
- o quantity of food, ordered supplements of medication.
- o the quality or quantity of patient supervision and care planning.
- o the competency or inability of any employee to discharge care responsibilities;
- o the formation of decubitus ulcers.
- o the failure to prevent decubitus ulcers, properly care for the skin of residents, and turn and reposition patients at least every two hours.
- o the failure to notify the physician of significant changes in the skin condition of residents.
- o the failure to formulate and implement a health care plan for prevention of decubitus ulcers.
- o the failure to adequately treat any decubitus ulcer and follow physicians' orders with respect to such condition.
- o the failure to monitor and assess on an ongoing basis the skin condition of patients.

This request includes but is not limited to any complaint, criticism, allegation, unfavorable evaluation or document as described above: created by current employees of Loving Arms Nursing Home; former employees of Loving Arms Nursing Home; patients; relatives or friends of residents; interested third parties; any physician or health care professional who has been exposed to the care rendered at Loving Arms Nursing Home; or any consultant, independent contractor or person engaged to perform services for you. This request also includes any complaint, criticism, allegation, unfavorable evaluation or document as described above: 1) received by the administrator, the director of nurses or any employee of Loving Arms Nursing Home; 2) received by any of your central office/headquarters employees or staff; 3) recorded, filed, memorialized or electronically stored by you in response to any complaint, allegation, unfavorable evaluation or criticism; or 4) a summary of any complaint(s).

- o All documentation and reports from any consultant or management personnel hired by you to evaluate the adequacy of care rendered residents at Loving Arms Nursing Home from December 1, 1988 to April 1, 1990.

Central Focus: This request includes but is not limited to any ongoing or periodic report, study, evaluation or assessment generated by the following consultants or employees of Loving Arms Nursing Home: 1) R.N. Nurse Consultant; 2) Pharmaceutical Consultant; 3) Registered Dietician Consultant; 4) Quality Assurance Staff; or, 5) any other health or medical consultant brought in or employed to evaluate or study the adequacy of care. Further, this request includes any minutes from all meetings conducted by any of the above consultants or employees during the aforementioned time frame.

- o All internal documents and reports from the medical director or medical advisor of Loving Arms Nursing Home during the period of December 1, 1988 to April 1, 1990 which evaluates, analyzes, complains about, assesses, reaches conclusions or findings, or makes recommendations about the quality and quantity of nursing services, medical services, pharmaceutical services, dietary services or any aspect of patient care.
- o All studies, internal audits, reviews or documentation examining whether Loving Arms Nursing Home had sufficient number of nursing personnel to: 1) provide 24-hour nursing services; 2) meet the needs of residents who are admitted to and remain in the facility; 3) meet the total nursing needs recipient-patients.

This request includes any documentation, as such term is defined in the above, in your control, that in any way addresses the question of whether there were sufficient numbers of nursing personnel at Loving Arms Nursing Home between the dates of December 1, 1988 to April 1, 1990.

- o Any and all skin care or decubitus ulcer reports, audits, studies, evaluations, or documents created with respect to residents at Loving Arms Nursing Home Nursing Center between the dates of December 1, 1988 and April 1, 1990.

This request includes but is not limited to any document which in any way discusses or reports about : a) the numbers of decubitus ulcers at Loving Arms Nursing Home at any one time; b) the workload imposed upon staff as a result of presence of patients in said facility with decubitus; c) the numbers of "in-house" decubitus at Loving Arms Nursing Home (i.e. sores induced at said facility); d) the site, stage and origin of any decubitus at Loving Arms Nursing Home Nursing Center; e) the characteristic of any sore at said facility including whether the sore was necrotic, draining or infected; f) the size and depth of any decubitus; g) the history of any sore including whether the sore improved or deteriorated; or,

- h) whether a culture was obtained with respect to any sore and the results of such culture.
- o Any and all documentation requested by, received by, or furnished to any member of the governing body (for Loving Arms Nursing Home) pertaining to:
  - o the compliance by said nursing home with all applicable laws and long-term care licensing standards between the dates of December 1, 1988 to April 1, 1990.
  - o the compliance by said nursing home with all of its resident care policies and procedures; quality assurance policies and procedures; personnel policies and procedures; and administrative policies and procedures between the dates of December 1, 1988 to April 1, 1990.
  - o any investigation of any complaint, survey deficiency, licensure violation, penalty or incident/accident occurring at Loving Arms Nursing Home.
  - o any quality assurance function report, evaluation, finding of conclusion arising out of conditions at Loving Arms Nursing Home between December 1, 1988 to April 1, 1990.
  - o any recommendation, report, finding, or memorandum from any management or health care consultant engaged to study conditions at Loving Arms Nursing Home from December 1, 1988 to April 1, 1990.
  - o any action taken or recommendation made by the administrator, director of nurses, consultant, medical director or medical advisor of Loving Arms Nursing Home between December 1, 1988 to April 1, 1990.
  - o any medical care evaluation study as conducted at Loving Arms Nursing Home as required by 40 TAC § 16.7104.
  - o adequacy of supervision for nursing personnel by charge nurses, the director of nurses, or the administrator of Loving Arms Nursing Home between December 1, 1988 to April 1, 1990.
  - o any periodic report made by the administrator or any department head at Loving Arms Nursing Home between December 1, 1988 to April 1, 1990 on the status of operations or care at said facility..
  - o any and all audits, studies, evaluations, or documents created with respect to residents at Loving Arms Nursing Home Nursing Center between the dates of December 1, 1988 and April 1, 1990 pertaining to any subject specifically identified in paragraphs above.

- o Any procedure, policy, guideline, or protocol that was specifically developed by you in response to any problem in patient care or treatment at Loving Arms Nursing Home between the dates of December 1, 1988 to April 1, 1990 that was noted to exist in any document that is hereinabove requested in this, PLAINTIFF'S SECOND REQUEST FOR PRODUCTION OF DOCUMENTS AND TANGIBLE THINGS.

#### **10. REQUEST FOR WAIVERS**

- o All requests or applications for the waiver of any requirement imposed by the rules and regulations promulgated by Texas Department of Health [25 TAC § 145.1 et seq.], the Texas Department of Human Services [40 TAC § 16.901 et seq.] or the United States Department of Health and Human Services [42 CFR § 405.1101 et seq.] upon Loving Arms Nursing Home, submitted by you through the local Texas Department of Health Long Term Care Unit, for purposes of permanently or temporarily relieving Loving Arms Nursing Home of any regulatory obligation.
- o Any documented findings or study undertaken by you for the purposes of supporting a request for waiver at Loving Arms Nursing Home, between the dates of December 1, 1988 to April 1, 1990, of any requirement imposed by the rules and regulations identified in above paragraphs.

#### **11. IN-SERVICE**

- o Any and all documents containing a schedule of in-service education or training classes conducted at Loving Arms Nursing Home for employees having responsibility for any aspect of patient care between the dates of December 1, 1988 to April 1, 1990.
- o Any and all attendance sheets, rosters of personnel present, or documentation which identifies employees who attended any in-service or training program conducted at Loving Arms Nursing Home between the dates of December 1, 1988 to April 1, 1990
- o Any documentation by the training coordinator for Loving Arms Nursing Home containing a determination of the status of all employees of Loving Arms Nursing Home responsible for any part of the care given to residents between the dates of December 1, 1988 to April 1, 1990, with respect to training programs, training needs, competencies and the credentials of any employee receiving training.
- o A copy of any film, video, recording, book, periodical, material or other documentation that was provided by you or the Training Coordinator of Loving Arms Nursing Home to any nursing personnel of said facility for purposes of demonstrating, describing or instructing employees on the

proper care of patients between the dates of December 1, 1988 to April 1, 1990 including but not limited to the following subjects:

- o the prevention of decubitus ulcers ( pressure sores).
- o the reason pressure sores develop and how they develop.
- o how to identify residents who are at risk for pressure sore development.
- o the importance of turning, repositioning, range of motion exercise, and keeping the skin clean and dry.
- o the frequency of turning, repositioning, range of motion exercise necessary to for residents at risk for pressure sore development.
- o the proper turning, repositioning, or range of motion technique.
- o the observations and assessments necessary for residents susceptible to pressure sores or with existing sores.
- o recognition of significant changes in the skin condition or existing decubitus.
- o infection control technique when caring for a residents with decubitus ulcers.
- o the proper treatment of decubitus ulcers.
- o proper incontinent care.
- o the proper application and removal of a leg immobilizer for a resident with a broken leg.

## **12. GENERAL**

- o All licenses issued by the Texas Department of Health to operate Loving Arms Nursing Home as a nursing facility between the dates of December 1, 1988 through April 1, 1990.
- o Any and all documents containing information as to the daily patient census at Loving Arms Nursing Home between the dates of December 1, 1988 through April 1, 1990.
  - This request includes but is not limited to any document showing the daily rate of occupancy, the number of beds filled on a daily basis, or the number of empty beds on a daily basis.
- o Any and all documents created by you on a periodic basis between the dates of December 1, 1988 through April 1, 1990 which relate to Loving Arms Nursing Home and contain an analysis or report of any of the the following:
  - o Loving Arms Nursing Home's rate of occupancy.
  - o the number of beds filled or empty during any report period.

- o the level of care required for each member of the patient population; or
- o any evaluation by management regarding the relative success of the occupancy goals, objectives and strategies established for Loving Arms Nursing Home.
- o Any blueprint, layout, floorplan, drawing, graphical representation, or illustration which accurately illustrates the floorplan of Loving Arms Nursing Home during John Doe's residency at said facility.  
This request seeks an accurate floorplan or illustration which correctly identifies the room numbers in the facility.

### **C] INTERROGATORIES**

The following are basic Interrogatories served in a case involving a progressive injury to wit: decubitus ulcer case.

#### INTERROGATORY NO. 1:

On the dates of the incidents made the basis of this suit did the Defendant's own Loving Arms Nursing Home? If Defendant did not own Loving Arms Nursing Home during the entirety of John Doe's residency at said facility from November 25, 1989 to January 9, 1990, identify each and every owner of said facility (by date) during the aforementioned period of residency.

#### INTERROGATORY NO. 2:

Identify all members of the governing body for Loving Arms Nursing Home from November 25, 1989 to January 9, 1990, specifying:

- a) Name;
- b) Current or last known home address;
- c) Current or last known place of employment;
- d) Telephone;
- e) Dates each identified person served as member of governing body for Loving Arms Nursing Home.

#### INTERROGATORY NO. 3:

Please identify all individuals (by stating their name, current or last known home address, current or last known place of employment and telephone number) that Defendant has reason to believe possess knowledge relevant to the subject matter of this lawsuit or who Defendant is aware, through personal knowledge or belief, has or possibly may have knowledge relevant to the general or specific subject matter of this lawsuit, including any defense to any cause of action asserted by Plaintiff in its Original Petition:

This Interrogatory does not seek a multi-part answer or an answer segregated as to each subpart but rather seeks one answer containing the identity of any individual who has or may have knowledge of facts relevant to any subject described above in this Interrogatory.

INTERROGATORY NO. 4:

If an in-house investigation was conducted into the injuries sustained by John Doe, or any factual allegation raised in this lawsuit (including the Plaintiff's claim for damages) by or on behalf of the Defendant in the ordinary course of its business, state the name, address and relationship to the Defendant of each individual who participated in such investigation.

For purposes of this Interrogatory, Plaintiff seeks information about any internal investigation undertaken after the occurrences made the basis of this lawsuit and before the Defendant received formal notice of this lawsuit.

INTERROGATORY NO. 5:

Regarding the aforementioned in-house investigation, please completely describe it, including:

- a) The investigative efforts undertaken;
- b) All documents, drawings, films, models or other items generated or obtained by or on behalf of the defendant, which are relevant or contain information relevant to:
  - 1) the cause of the occurrence in question;
  - 2) the injuries allegedly sustained by the plaintiffs;
  - 3) the defendant's affirmative defenses to the plaintiff's cause of action;
- c) All statements obtained by or on behalf of the defendant;
- d) All physical and/or tangible items and/or potentially usable evidence obtained by or on behalf of the defendant from the scene of the occurrence in question;
- e) All individuals contacted during the investigation.

INTERROGATORY NO. 6:

Do you or your attorneys have in your possession, custody or control, any statement of any person (including any Plaintiff) concerning the facts surrounding this controversy, including any written statements, signed or otherwise, adopted or proved by such person or any stenographic, mechanical, electrical, or other recording or any transcription thereof which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously reported? If so, please state the following:

- a) The name, address and phone number of the person from whom it was obtained;
- b) The date it was obtained;

- c) The title or position of the person who obtained it;
- d) Where it was obtained;
- e) Whether the statement was signed by the person giving the statement. If it was not signed, please state how the statement is connected with the person purportedly giving the statement. For example, telephone-recorded conversation, etc.

**INTERROGATORY NO.7:**

Please identify each and every employee of Loving Arms Nursing Home (including every nurse aide) who provided care to John Doe or in any way monitored or supervised John Doe while a resident of Loving Arms Nursing Home.

As defined above "identify" means to provide: a) the name of the individual; b) the current or last known home address; c) the current or last known place of employment; and, d) telephone number.

**INTERROGATORY NO. 8:**

Describe in detail (from the date John Doe was admitted to Loving Arms Nursing Home, November 25,1989, to his discharge on January 9, 1990) all care, preventative measures and steps, and specific actions taken during each shift to prevent the occurrence of skin breakdown and the development of pressure sores on John Doe.

For purposes of this Interrogatory "preventative measures and steps" includes any health care planning (the formulation and and implementation of an approach to prevent pressure sore); the update and modification of such plan as the needs of the resident changed; all preventative care including repositioning, turning, range of motion exercise, pressure relief devices or action taken by nursing personnel to prevent the development of pressure sore; and all efforts to monitor the condition of the skin .

<b>DATE</b>	<b>SHIFT</b>	<b>CARE AND PREVENTATIVE MEASURES</b>

**INTERROGATORY NO.9:**

With respect to the preceding Interrogatory, identify: a) each and every document you used or upon which Defendant has relied in supplying answer to the foregoing Interrogatory; b) each and every document relevant and/or containing information relevant to said answer; and, c) each individual having knowledge relevant to Defendant's answer to the foregoing Interrogatory.

For purposes of this Interrogatory, Plaintiff seek identifying information in accordance with the Definitions of "identify" hereinabove set forth.

INTERROGATORY NO.10:

Describe in detail the location, size and "stage" of each decubitus ulcer (bed sore) on John Doe when John Doe was first admitted to your nursing home. For this Interrogatory, "stage" means the following:

Stage I: Reddened area or inflammation

Stage II: Superficial skin break with redness surrounding break

Stage III: Deep, involving muscle tissue but without necrotic tissue

Stage IV: Deep, with extensive muscle involvement and with necrotic tissue

For your convenience, please carefully note the location of each decubitus ulcer on the following diagrams. The locations should be numbered so that your description of the stage can be keyed to the location of each sore. If necessary, please use additional pages for description.

INTERROGATORY NO.11:

Describe in detail the location, size and "stage" of each decubitus ulcer (bed sore) on John Doe when John Doe was finally discharged from your nursing home on the 9th day of January 1990. The term "stage" has the same meaning in this Interrogatory as in the preceding Interrogatory.

For your convenience, please carefully note the location of each decubitus ulcer on the following diagrams. The locations should be numbered so that your description of the stage can be keyed to the location of each sore. If necessary, please use additional pages for description.

INTERROGATORY NO. 12:

Specifically state each and every date nursing personnel of Loving Arms Nursing Home or any person engaged by you to render services at said facility notified either Dr. A or Dr. B about any change in the condition of John Doe or any problem with respect to Joe Doe's care.

**§1.08 Conclusion**

In the not too distant past, malpractice cases involving long term care residents generated little interest on the part of the legal profession. Despite the fact that voluminous investigative reports had chronicled an epidemic of widespread neglect, recurrent physical abuse, and abysmally poor care in America's long term care institutions for over two decades, and despite the fact that complaints by family members to lawyers about such care abounded, civil litigators were unenthusiastic about these cases. Perceived by practicing lawyers as extremely difficult cases due to the absence of provable lost income and the presence of complex medical histories

presented by the alleged victims, geriatric residents had virtually no recourse against a nursing home or its employees for neglect or abuse.

In recent years, however, as the standard of care in nursing home has escalated by reason of upgraded regulations and legislative enactments; as the number and amount of exemplary damage awards and awards for pain, suffering, and mental anguish in tort cases has radically increased throughout the country; and as lawyers have realized that when the egregious and deviant behavior of nursing home employees and/or operators is combined with the magnified vulnerability of the nursing home resident, a case capable of yielding significant damages for pain, suffering, mental anguish and punitive damages is produced; the legal community has reassessed its earlier position.

Undoubtedly fueling this evolutionary process is the continual flood of profoundly disturbing exposes, studies, and investigations dealing with the hazardous and life-threatening conditions that many nursing home residents frequently encounter. Typically, these reports conclude, as did the Institute of Medicine, that:

Today, nursing homes can be found in every state that provide seriously inadequate quality of care. In many government-certified nursing homes, individuals who are admitted receive very inadequate -- sometimes shockingly deficient -- care that is likely to hasten the deterioration of their physical, mental, and emotional health.<sup>79</sup>

Such reports have galvanized public concern for the quality of care provided the aged; increased the likelihood that residents and family members in cases where elder malfeasance is suspected will seek the advice and/or legal assistance of an attorney; and created a substantial degree of bias in potential jury pools in most jurisdictions. Not surprisingly, long term care facilities have become, in the mind of the general public, symbols of abandonment, isolation, and neglect. Awakened to the foregoing realities, and fearful of a jury whose preconceived notion of nursing home care may be aggravated by the events and evidence described in §1.06 [Summary of Factors Influencing the Size of Verdict or Settlement], insurance carriers and defense attorneys have begun to pay careful attention to allegations of substandard care. No longer are these suits merely assigned a nuisance value. Today, the nursing home maltreatment case represents a substantial threat to the economic viability of a long term care institution who maintains first dollar insurance coverage or carries no excess policy, or alternatively to the pocketbook of the insurance carrier, who is responsible for such coverage.

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<sup>79</sup>*Improving the Quality of Care in Nursing Homes, Appendix A.* 239-253. National Academy of Science, Institute of Medicine, Committee on Nursing Home Regulation. 1986.

Concomitantly, a heightened awareness to the effects of iatrogenic and nursigenic<sup>80</sup> behavior and increased interest in litigation arising therefrom has emerged within the plaintiff's bar. Such interest heralds the arrival of a new legal frontier. The skeleton which long has existed in the proverbial nursing home closet has emerged and at last has entered the courtroom. It is this author's sincere hope that the materials contained herein will prove beneficial to the plaintiff's bar as it explores the legitimate boundaries of this unfolding area of practice.

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<sup>80</sup>For a proposed definition of nursigenic, see Miller, M.: Iatrogenic and Nursigenic Effects of Prolonged Immobilization of the Ill Aged, *Journal of American Geriatric Society*, 1975; Volume 23, pages 360-369. "...in a variety of dictionary and word sources, terminology identifying a nurse-induced abnormal state in a patient by inadvertent or erroneous treatment is singularly lacking. In the absence of a suitable word, we propose the term 'nursigenic' derived from the French 'inourric' for nurse."