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# Comment

## STATUTORY LIMITS ON PUNITIVE DAMAGES IN NURSING HOME NEGLIGENCE TORT ACTIONS: PREVENTING THE COLLAPSE OF THE PRIVATE NURSING HOME

TERRANCE J. SHANAHAN\*

### INTRODUCTION

There are more “older Americans”<sup>1</sup> than ever before, and they are going to place burdens on the long-term care system beyond what has ever been seen as the population grows and their percentage of the population increases. The American Association of Retired Persons reported that there were 34.4 million “older Americans” in 1998, accounting for 12.7% of the population.<sup>2</sup> While the growth of the older population slowed somewhat during the 1990’s due to low birth-rates during the Great Depression, the “Baby Boomer” generation will vastly increase the older population as it reaches age sixty-five between 2010 and 2030.<sup>3</sup> It is projected that by 2010 there will be 39.4 million “older Americans,” and that by 2030 their numbers will have reached 69.4 million, comprising 20% of the population.<sup>4</sup> As the percentage of the population over age sixty-five increases, so will the need to care for those aging citizens. About seven million Americans over age sixty-five required long-term care services in 1997.<sup>5</sup> Projections show that approximately 10.8 million “older Americans” will be in need of long-term care by 2030.<sup>6</sup> The question that remains to be answered is whether there will be enough long-term health care facilities in the United States in the years to come to meet the demand.

Recently, lawsuits over patient care and treatment in the nation’s nursing homes have exploded.<sup>7</sup> The result has been larger damage

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1. Those Americans over the age of sixty-five.

2. See American Association of Retired Persons, *A Profile of Older Americans, 1999*, (November 1999) (visited Jan. 6, 2001) <<http://research.aarp.org/general/profile99.pdf>>.

3. See *id.*

4. See *id.*

5. Natalie Graves Tucker et al., *AARP Public Policy Institute Report on Long-Term Care*, (May 2000) (visited Jan. 6, 2001) <<http://research.aa>

6. See *id.*

7. See *infra* notes 103-108 and accompanying text.

awards than previously seen, especially punitive damages.<sup>8</sup> Without curbs on punitive damages, nursing homes will not be viable business entities that will be able to meet the needs of their patients in either the near-term or the future.

This paper will primarily consider Florida and California due to the size of their elderly population.<sup>9</sup> Section I will review the recent history of punitive damages in the United States, and attempts to curb those damages.<sup>10</sup> Section II will present some recent punitive damage awards in nursing home negligence cases that illustrate the magnitude of the problem.<sup>11</sup> Section III will examine the affect massive punitive damage awards has on nursing homes' ability to procure liability insurance.<sup>12</sup> Section IV offers possible statutory solutions that meet the industry's need for financial survival as well as the public's need for dependable, humane, and competent treatment of its most vulnerable citizens.<sup>13</sup>

## I. PUNITIVE DAMAGES

Punitive damages in the United States have a historical basis dating back to England in the 1200's.<sup>14</sup> The Eighth Amendment prohibition on excessive fines is based on provisions in the Magna Carta that required that damages be proportional, reasonable, and that a sensible relationship exist between the offense and the punishment, with the punishment not being so harsh as to preclude the offender from having a future livelihood.<sup>15</sup>

### A. *The Supreme Court Opens the Door to Considering Constitutional Questions on Punitive Damages*

Constitutional challenges to punitive damages during the 1800s had routinely failed.<sup>16</sup> This record continued essentially unaltered until the Supreme Court's 1986 decision in *Aetna Life Insurance Com-*

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8. See *infra* notes 96, 97 and accompanying text.

9. See *infra* note 54 and accompanying text.

10. See *infra* notes 14-52 and accompanying text.

11. See *infra* notes 53-91 and accompanying text.

12. See *infra* notes 92-110 and accompanying text.

13. See *infra* notes 111-139 and accompanying text.

14. See RICHARD L. BLATT ET AL., PUNITIVE DAMAGES 5 (1991).

15. See *id.*

16. See *The Amiable Nancy*, 16 U.S. 546 (1818), *Day v. Woodworth*, 54 U.S. 363 (1852), (both challenges under the Eighth Amendment), *Missouri Pacific Railway Company v. Hume*, 115 U.S. 512 (1885) (Fourteenth Amendment challenge).

pany v. La Voie.<sup>17</sup> In *Aetna*, Chief Justice Burger, writing the unanimous opinion, stated that the constitutional questions that the appellant (*Aetna*) raised under both the Excessive Fines Clause<sup>18</sup> and the Due Process Clause<sup>19</sup> were important issues that should be resolved, but that it was unnecessary for the Court to reach any conclusions then.<sup>20</sup> While the Court did not address the constitutionality of punitive damages in *Aetna*, the decision opened the door to future challenges. However, in 1988, the Court again declined to review the constitutionality of punitive damages in *Bankers Life and Casualty Co. v. Crenshaw*.<sup>21</sup>

In *Bankers Life*, the Court indicated that it preferred to allow the states to have time to craft a legislative solution, or for state courts to rule on the state constitutionality of punitive damages.<sup>22</sup> In her concurring opinion, Justice O'Connor articulated the belief that because juries in Mississippi were given such unfettered discretion in determining punitive damages, there might exist a violation of the Due Process Clause.<sup>23</sup> While reserving decision for another case as to the due process issues, Justice O'Connor questioned the constitutionality of allowing juries "standardless discretion" in determining punitive damages.<sup>24</sup>

### B. The Court Refines Its Approach to Punitive Damages

The set of cases decided from 1991 to 1995 had a huge impact on punitive damages. Starting in 1991 with *Pacific Mutual Life Insurance*

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17. 475 U.S. 813 (1986). In *Aetna*, the cause of action was for failure to pay an insurance claim and bad-faith refusal to pay a claim. *See id.* at 815. The case turned on the failure of an Alabama Supreme Court justice to recuse himself from the case when the decision in *Aetna* would have a direct impact on pending litigation of which he was a party. *See id.* at 815, 816. The U.S. Supreme Court vacated and remanded on the recusal issue, and thus never reached the issue of the unconstitutionality of the \$3.5 million punitive damage award in the case. *See id.* at 828.

18. U.S. CONST. amend. VIII, cl. 2.

19. U.S. CONST. amend. XIV, § 1, cl. 2.

20. *See Aetna*, 475 U.S. at 827.

21. 486 U.S. 71 (1988). *Bankers Life* was a case brought for bad-faith refusal to pay an insurance claim for loss of a limb. *See id.* at 75. The jury awarded \$20,000 in actual damages (the policy limit), and \$1.6 million in punitive damages. *Id.* When appealed, the Mississippi Supreme Court affirmed the trial court's decision without modification which, under Mississippi law, triggered a 15% penalty, or \$243,000, added to the damages against *Bankers Life*. *Id.* at 75,76. Justice Marshall, writing for the U.S. Supreme Court indicated that the Court could not reach the issue of constitutionality of the size of the punitive damages since the issue had not been raised in the initial appeal of the trial court's decision. *Id.*

22. *See id.* at 79-80.

23. *See id.* at 87 (O'Connor, J., concurring).

24. *See id.* at 88-89 (O'Connor, J., concurring).

*Company v. Haslip*,<sup>25</sup> the Court began to refine the parameters of punitive damage awards. In *Pacific Mutual* the Court indicated that the common-law method for computing punitive damages did not in itself violate due process, but that to say that just because the imposition of punitive damages is a long-standing tradition does not mean that such an imposition could never be unconstitutional.<sup>26</sup> The Court also pointed out that it would be unable to draw a "mathematical bright line" between constitutionally acceptable and unacceptable damages.<sup>27</sup> The Court went on to say that "[g]eneral concerns of reasonableness and adequate guidance from the court when the case is tried to a jury properly enter into the constitutional calculus."<sup>28</sup> The punitive damage award in *Pacific Mutual* was more than four times greater than the compensatory damages, causing the Court to admit that the disparity might "be close to the line," but that the award was not lacking in objective criteria.<sup>29</sup>

Even though a punitive damage award between four and five times greater than the compensatory award was "close to the line" in *Pacific Mutual*,<sup>30</sup> a punitive damage award that was 526 times greater than the actual damages awarded by the jury was not found to be excessive in *TXO Production Corp. v. Alliance Resources Corp.*<sup>31</sup> The Court found that the jury could have reasonably found that TXO Production Corporation had engaged in malicious and fraudulent behavior to recover royalties to which the plaintiff was entitled.<sup>32</sup> The Court also indicated that the ratio of compensatory damages to punitive damages, while high, would have been significantly reduced had TXO's schemes come to fruition, causing Alliance greater damages.<sup>33</sup>

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25. 499 U.S. 1 (1991). *Pacific Mutual* involved a denial of coverage for hospitalization due to the agent of Pacific Mutual misappropriating the premiums, which allowed the policies to lapse. See *id.* at 5-6. Pacific Mutual was sued under the theory of respondeat superior. See *id.* at 6.

26. See *id.* at 17-18.

27. See *id.* at 18.

28. *Id.* at 18.

29. See *id.* at 23.

30. See *id.*

31. 509 U.S. 443 (1993). In *TXO*, the respondent Alliance had brought suit for common-law slander of title because TXO had struck a deal with Alliance that included Alliance disgorging TXO's original payments if the land that was to be used did not have good title. See *id.* at 447, 448. TXO's attorneys discovered good title to the tract of land, but instead attempted to execute a quitclaim deed with a previous owner, then tried to obtain an affidavit from another party in the title chain. See *id.* at 449. TXO then indicated to Alliance that it (TXO) probably had acquired the oil and gas rights to the tract of land, and attempted a renegotiation of the royalty arrangement under false pretenses. See *id.*

32. See *id.* at 462.

33. See *id.* at 462.

C. *Punitive Damages Review Must Pass Due Process Analysis*

The Court addressed the issue of judicial review of punitive damage awards in *Honda Motor Co., v. Oberg*.<sup>34</sup> In *Honda*, the Court found an Oregon law prohibiting judicial review of punitive damage awards to be a violation of the Due Process Clause, distinguishing the outcome of a civil proceeding from that of a criminal trial.<sup>35</sup> The Court held that:

A decision to punish a tortfeasor by means of exemplary damages is an exercise of state power that must comply with the Due Process Clause of the Fourteenth Amendment. The common-law practice . . . and elementary considerations of justice all support the conclusion that such a decision should not be committed to the unreviewable discretion of a jury.<sup>36</sup>

D. *The Supreme Court Strikes Down an Excessive Punitive Damage Award*

In *BMW of North America, Inc. v. Gore*,<sup>37</sup> the Court once again addressed a punitive damage award with a huge disparity between it and the actual damages.<sup>38</sup> The Court indicated that most states afford latitude to juries when awarding exemplary damages, only requiring that those damages be reasonably necessary to reiterate legitimate state interest in deterring future similar acts and punishing the act at hand.<sup>39</sup> Further, "the federal excessiveness inquiry appropriately begins with an identification of the state interests that a punitive award is designed to serve."<sup>40</sup> The Court opined that only if an award can be categorized as "grossly excessive" in relation to these [legitimate state] interests "does it enter the zone of arbitrariness that violates the Due Process Clause . . . ."<sup>41</sup> Also, the Court refused to allow a state to impose sanctions for conduct that the state finds untoward, but is lawful in, and conducted in another state.<sup>42</sup>

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34. 512 U.S. 415 (1994). *Honda* was a product liability action brought due to injuries Oberg suffered while riding a Honda three-wheeled all-terrain vehicle. *See id.* at 418.

35. *See id.* at 434.

36. *Id.* at 434-35.

37. 517 U.S. 559 (1996). In *BMW*, the cause of action was for a new car being repainted before sale, then sold as new, unbeknownst to the first purchaser (Respondent Gore). *See id.* at 563.

38. The punitive were 500 times larger than actual damages (\$4000 in actual to \$200 million in punitive). *See id.* at 582.

39. *See id.* at 568.

40. *Id.*

41. *Id.*

42. *See id.* at 572.

Whether there is a legitimate state interest must be the first inquiry in a punitive damages question.<sup>43</sup> When answered in the affirmative, those punitive damages must not be significantly greater than the legitimate state interest identified in the initial inquiry.<sup>44</sup> The Court additionally found that the notice requirement was so fundamental to the inquiry as to be one of the “elementary notions of fairness enshrined in our constitutional jurisprudence.”<sup>45</sup> The Court articulated a three prong test to determine whether a party had received fair notice of both the conduct that would subject him to a given punishment, and the severity of the punishment were it imposed.<sup>46</sup>

The three prong test that the Court articulated was: “the degree of reprehensibility of the [act]; the disparity between the harm suffered by the [plaintiff] and his punitive damages award; and difference between this remedy and the civil penalties authorized or imposed in comparable cases.”<sup>47</sup> The Court opined that each of the prongs indicates that BMW had received neither adequate notice of the existence of such a sanction nor notice of the magnitude of the potential sanction.<sup>48</sup> The Court went on to reiterate that “our decisions in both *Haslip* (*Pacific Mutual*) and *TXO* endorsed the proposition that a comparison between the compensatory award and the punitive award is significant.”<sup>49</sup>

The Court also pointed out that the damages imposed cannot be justified to deter future misconduct if other, less drastic, measures were not attempted.<sup>50</sup> Additionally, a multimillion dollar judgment that garners the desired result for the state provides no clarity as to whether a lesser remedy would have sufficed.<sup>51</sup> The Court concluded its opinion in holding that the punitive damages assessed against BMW, which were 500 times the compensatory damages, violated the Due Process Clause.<sup>52</sup>

While *BMW* is a narrowly written opinion, the standards articulated have many applications. The cases to this point addressing punitive damages have all involved damages to property. It remains to be

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43. *See id.* at 574.

44. *See id.*

45. *Id.*

46. *See id.*

47. *Id.* at 574-75.

48. *BMW of North America v. Gore*, 517 U.S. 559 (1996).

49. *Id.* at 581.

50. *See id.* at 584.

51. *See id.*

52. *See id.* at 585-86.

seen how the Court will react to punitive damages in a nursing home negligence cases with parameters similar to *BMW*.

## II. RECENT NURSING HOME CASES INVOLVING PUNITIVE DAMAGE AWARDS

Very often plaintiffs in nursing home negligence cases face lesser burdens to prove their cases.<sup>53</sup> This is the case in both California and Florida, states with the largest and second largest populations of "older Americans" respectively.<sup>54</sup> *Delany v. Baker*,<sup>55</sup> a recent California case illustrates what defendants face when sued for neglect of an elderly patient. In *Delany* the Supreme Court of California found that under section 15657 of the Elder Abuse and Dependent Adult Civil Protection Act,<sup>56</sup> health care providers whose actions involve neglect of elderly patients are not subject to the remedies for professional negligence, but to the heightened remedies allowed under the Elder Abuse Act.<sup>57</sup> The court also concluded that if a medical professional improperly performs a custodial function, and the function can be considered "reckless" or done with "malice, oppression, or fraud" that it then crosses the line beyond professional negligence and meets the criteria under section 15657.<sup>58</sup>

In Florida, plaintiff's lawyers also have a powerful weapon at their disposal, the Nursing Home Residents' Bill of Rights,<sup>59</sup> which defines the rights to which residents are entitled, but also allows plaintiffs to sue without having to meet burdens imposed under negligence standards. The companion to the section on patient rights is the section on civil enforcement<sup>60</sup> which provides that "punitive damages may be awarded for conduct which is willful, wanton, gross or flagrant, reckless, or consciously indifferent to the rights of the resident."<sup>61</sup>

Several Florida cases have featured massive punitive damage awards since the Nursing Home Residents' Bill of Rights was enacted. *Beverly Enterprises-Florida, Inc. v. Spilman*<sup>62</sup> was an appeal of a judgment

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53. See *infra* notes 56-61.

54. American Association of Retired Persons, *A Profile of Older Americans, 1999*, (November 1999) (visited Jan. 6, 2001) <<http://research.aarp.org/general/profile99.pdf>>. In 1998, California had a population over the age of 65 of over 3.5 million, while Florida had a similar population of 2.7 million.

55. 971 P.2d 986 (Cal. 1999).

56. CAL. WELF. & INST. § 15657 (1991).

57. See *Delaney*, 971 P.2d at 990.

58. See *id.* at 993.

59. FLA. STAT. ANN. § 400.022 (West 1993).

60. See *id.* at § 400.023.

61. *Id.* at § 400.023 (5).

62. 661 So. 2d 867 (Fla. Dist. Ct. App. 5th Dist. 1995).



awarding \$719,064.02 in compensatory damages and two million dollars in punitive damages.<sup>63</sup> The appellate court found that the jury could reasonably have found that the acts and omissions of the appellant warranted an award of punitive damages.<sup>64</sup> Among the findings of the trial court recorded in the appellate opinion is that “the nursing home knew when the state would come to inspect, and, on those occasions, staffing was increased and care improved. The walls were painted, the floors were buffed, and new linens, diapers, and towels were provided. The linens were taken back after the inspection, however.”<sup>65</sup> The court also found that the appellant was liable both vicariously and directly, thus bolstering the argument for finding the punitive damages reasonable.<sup>66</sup>

Another Florida case, *First Healthcare Corporation v. Hamilton*,<sup>67</sup> involved a punitive damage award of \$4.5 million<sup>68</sup> to the decedants of Charles Barnes, who wandered away from his nursing home and drowned in a nearby pond.<sup>69</sup> The court found that a jury could reasonably conclude that the defendants were “consciously indifferent to the rights of the patient.”<sup>70</sup> This finding was based on evidence that the nursing home knew the patient suffered from dementia; was on seven medications; was prone to wander off and had done so in the past; as well as his wife’s plea to have the sliding glass door on his room repaired so he could not egress the building.<sup>71</sup> Additionally, the evidence showed that his wife had requested a device known as a wanderguard be attached to him to alert the staff when he was loose.<sup>72</sup>

Noteworthy in *First Healthcare* is not only the size of the punitive damage award, but that it was essentially for failure to keep constant watch on one patient which, under Florida law, is violative of that patient’s rights.<sup>73</sup> In his succinct dissent, Senior Judge William C. Owen points out what was articulated by the Supreme Court in *BMW*—one “indicium of excessiveness” lies in a comparison of the punitive dam-

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63. *See id.*

64. *See id.* at 870.

65. *Id.* at 871.

66. *See id.* at 873.

67. 740 So. 2d 1189 (Fla. Dist. Ct. App. 4th Dist. 1999).

68. *See id.* at 1196.

69. *See First Healthcare Corp. v. Hamilton*, 740 So. 2d 1189, 1191 (Fla. Dist. Ct. App. 4th Dist. 1999).

70. *Id.* at 1197.

71. *See id.*

72. *See id.*

73. *See id.* at 1197, 1198.

age award and the criminal or civil penalties that could be imposed for similar misconduct.<sup>74</sup> Senior Judge Owen opined,

this sum total of misconduct, occurring over a period of twenty months while (we may assume) Mr. Barnes was otherwise properly cared for, is not legally sufficient to be an "entire want of care," nor does it rise to the level of the type of willful and wanton misconduct equivalent to criminal manslaughter which the courts have consistently held is required for the imposition of punitive damages.<sup>75</sup>

Further, the Senior Judge pointed out, "I would be quite surprised if my colleagues would, on these same facts, uphold a criminal conviction for manslaughter."<sup>76</sup> Indeed, the Supreme Court has opined that a reviewing court engaged in determining whether punitive damages are excessive should give "substantial deference" to legislatively imposed sanctions for similar conduct.<sup>77</sup> Florida is not alone in allowing massive punitive damages in alleged nursing home negligence cases.

A recent case in Texas involved a novel cause of action against a nursing home.<sup>78</sup> The cause of action was based on the aberrant sexual behavior of a patient that was known to administrators when he was admitted.<sup>79</sup> Morris Jones was caught in the act of attempting to rape ninety-eight-year-old Jewell Underwood in December 1996.<sup>80</sup> Ms. Underwood's daughter walked in on the assault and stopped it, however, a jury in Houston returned a verdict of five million dollars in compensatory damages and sixty million dollars in punitive damages against Healthcare Centers of Texas and Dr. Keith Rapp, who had transferred Jones from another nursing home to the one in which Ms. Underwood resided.<sup>81</sup> Ten million dollars of the punitive damage award was assessed against Dr. Rapp who settled for a confidential amount.<sup>82</sup> The trial court enter a judgment against Healthcare Centers for \$56.66 million.<sup>83</sup>

Analyzed using the standard applied in *BMW*, the inquiry must be whether Healthcare Centers or an officer of the company could have

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74. See *BMW*, 517 U.S. at 583.

75. See *First Healthcare*, 740 So. 2d at 1198.

76. *Id.*

77. See *BMW*, 517 U.S. at 583.

78. See Margaret Cronin Fisk, *Nursing Home Facilitated the Rape of Elderly Woman*, Nat'l L.J., Feb. 28, 2000, at C14.

79. See *id.*

80. See *id.*

81. See *id.*

82. See *id.*

83. See *id.*

been imprisoned or faced some other civil sanction for what transpired in the case. If so, it must be determined whether that criminal or civil sanction would be reasonably equated with the possibility of a punitive damage award of over fifty-six million dollars.<sup>84</sup> If the answer to either question is negative, the sanction against Healthcare Centers is a violation of Healthcare Centers' right to substantive due process.

Recently, a St. Petersburg, Florida jury awarded three million dollars in compensatory damages and seventeen million dollars in punitive damages to the estate of a man who died as a result of substandard care.<sup>85</sup> The plaintiff charged that the nursing home was below minimum standards "80% of the time" during the first thirty-five days of Charles McCorkle's stay, and, although the jury found that the understaffing was a violation of Mr. McCorkle's rights, it determined it was not the cause of his death.<sup>86</sup> Extencicare Health Facilities, the defendant, countered that there was no understaffing during Mr. McCorkle's stay<sup>87</sup> and that the medical examiner ruled the cause of Mr. McCorkle's death to be Alzheimer's Disease.<sup>88</sup> The plaintiff asked for a punitive damage award that was 5.66 times the requested amount of compensatory damages.<sup>89</sup> The case was eventually settled for some amount less than \$12 million.<sup>90</sup>

With the exception of *Spilman*, each of the aforementioned cases was decided subsequent to the decision in *BMW v. Gore*.<sup>91</sup> In each case the legitimate state interest seems clear, yet whether any of the

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84. See *BMW*, 517 U.S. at 583-84.

85. See Margaret Cronin Fisk, *Home's Alleged 'Under-Staffing' Policy Is An Issue For Jury*, Nat'l L.J., Oct. 16, 2000, at A14. The case is *Estate of McCorkle v. Extencicare Health Facilities*, No. 99-00815-CIV-011, Fla. Cir. Ct., Pinellas County, Sept. 27, 2000.

86. See *id.* The jury's verdict in the case was not for negligence, but for pain and suffering. See *Extencicare Hit with \$20 Million Verdict On Negligence Charges*, Nursing Home Litig. Rep., Oct. 20, 2000, Vol. 3, No. 1, at 3. Benny Lazara Jr. of Wilkes & McHugh, who represented the estate, said the verdict is "reportedly the largest verdict in the state in an elder-care case . . ." See *id.* The award in the *McCorkle* case tops a \$15.2 million award Lazara won in a case last year, *Butler v. LCA Operational Holding Co.*, No. 96-7862, Fla. Cir. Ct., Hillsborough County, Mar. 25, 1999. See *id.*

87. See *id.*

88. See *id.*

89. See *supra* note 85.

90. See David Sommer, *Pact Trims Jury Award Against Nursing Home*, TAMPA TRIB., Jan. 25, 2001, at 3. In an interesting twist to the case, the aunt who sued on behalf of McCorkle's estate turned out not to be his only heir. *Id.* McCorkle's adopted, estranged son, a trucker living in Georgia, was tracked down by private investigators, and is entitled to all the proceeds of the trial. *Id.* Extencicare Health Facilities, Inc., which once owned over 30 nursing homes in Florida has ceased doing business there according to Mel Rhinelander, Extencicare's Chief Operating Officer. *Id.* "Rhinelander predicted that by the end of this year, no nursing home [in Florida] will be able to get [liability] insurance." *Id.*

91. *BMW v. Gore* was decided on May 20, 1996.

punitive damages awards pass muster under the standards articulated in *BMW* is arguable. Additionally, whether the constitutionality of these massive awards in personal injury or elderly neglect cases is justifiable under current notions about punitive damages remains to be decided. Regardless of the ultimate outcome of any of these cases, it is becoming increasingly difficult to stay in business for for-profit nursing homes.

### III. THE EFFECT THAT MASSIVE PUNITIVE DAMAGE AWARDS HAVE ON LIABILITY INSURANCE COVERAGE

According to *Best's Insurance News*, the lack of options for nursing homes to afford, retain or find liability insurance has reached a crisis in several states including Florida, Texas and Pennsylvania.<sup>92</sup> Of seventy-nine insurers surveyed by the Florida Department of Insurance, seventeen are currently writing coverage, but six of them wrote no policies in 2000, five only wrote one policy, and two wrote two policies, with the remaining four insurers having written between four and sixteen policies each.<sup>93</sup> Twenty-three insurers who had provided coverage in the last three years no longer do so, according to the study.<sup>94</sup>

The Florida survey also found that the drop-off in coverage was inversely proportional to the rise in damage awards.<sup>95</sup> Between 1997 and 1999, settlements in the \$1 to \$250,000 range were fairly stable, with 161 claims totaling \$7.8 million in 1997 and 162 claims totaling \$6.8 million in 1999.<sup>96</sup> However, in claims settled for over \$250,000 the rise is startling. 1997 saw thirty-six claims that were settled for \$16.9 million, but by 1998 those numbers had risen to fifty-two claims totaling \$27.7 million, followed in 1999 by sixty-one claims with a value of \$29.3 million.<sup>97</sup> While these figures are alarming from the perspective of both the long-term health care industry, and their insurers, it should also be noted that in Florida, direct, as opposed to vicarious, punitive damages are not insurable, and are wholly borne by the nursing home if not reduced by the court.<sup>98</sup>

Texas is experiencing the same type of insurance issues as Florida, because, like Florida, many of the laws designed to protect senior

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92. See *Best's Ins. News*, Long-Term-Care Liability Market Continues to Shrink, Sept. 25, 2000.

93. See *id.*

94. See *id.*

95. See *id.*

96. See *id.*

97. See *id.*

98. RICHARD L. BLATT ET AL., PUNITIVE DAMAGES 162 (1991).

citizens, especially those in nursing homes, also lower the plaintiff's burdens and shift attorney's fees to the defendant.<sup>99</sup> Pennsylvania nursing homes are also feeling the crunch as insurers manage the risk outside of Florida and Texas. Gracedale Nursing Home, a 790-bed facility in Northampton County, Pennsylvania recently learned that their liability rate would be increased between 50% and 100%, which made their coverage for the year ending October 1, 2000 a whopping \$215,515.<sup>100</sup> Premiums at some Pennsylvania nursing homes have increased as much as 300%.<sup>101</sup> Given the comparative paucity of nursing home liability insurers, it appears that the runaway damage awards in some states like Florida and Texas are raising the costs for nursing homes nationwide, who must necessarily pass some of the costs on to the patients.<sup>102</sup>

A more recent report, conducted as an actuarial analysis of the cost of general and professional liability claims trends in Florida's long-term care industry, paints an even bleaker picture than before.<sup>103</sup> Among the study's findings, Florida has an annual cost per nursing home bed 12 times the national average.<sup>104</sup> Driving this disparity is that while Florida accounts for only 10% of all nursing home beds in the United States, it accounts for 44% of the total losses reported, and more than half of all losses reported in the last five years.<sup>105</sup> Additionally, nursing home operators in Florida withstand over four claims to every one in the rest of the nation.<sup>106</sup> "Loss costs"<sup>107</sup> in the United States have increased at an annual rate of 22% over the last decade, but in Florida during the same period there has been a 45% increase

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99. See Best's Insurance News, Long-Term-Care Liability Market Continues to Shrink, Sept. 25, 2000.

100. See *id.*

101. See *id.*

102. See *id.*

103. See Aon Risk Consultants, Inc., *Florida Long Term Care General and Professional Liability Actuarial Analysis* (visited Apr. 5, 2001) <<http://www.fhca.org>>. This report was done at the request of the Florida Health Care Association, a nursing home industry trade group. The data compiled included approximately 17,000 "non-zero" claims from several facilities that operate approximately 33,000 nursing home beds, which is 20% of the beds nationwide. The comparison between Florida and the rest of the country is based on three factors: the number of claims reported (frequency), the size of claims (severity) and the overall loss per exposure (loss cost). *Id.* at 1-2.

104. See *id.* at 3.

105. See *id.*

106. See *id.*

107. "Loss costs" are defined as "[representing] the annual amount per occupied bed expected to be paid to defend, settle and/or litigate GL/PL claims arising from incidents occurring during the respective year." *Id.* at 25. "GL/PL" is general liability/professional liability. *Id.* at 1.

per annum.<sup>108</sup> The astronomical increases in loss costs seen in Florida have made it nearly impossible for insurers to predict results, thus curtailing insurer willingness to write policies for Florida long-term care providers.<sup>109</sup> It is doubtful that these gigantic costs to the nursing homes have benefited the intended recipients, the injured patients or their families, because 47% of these costs are fees for lawyers, or costs associated with litigation.<sup>110</sup> While Florida is not wholly representative of the situation in all states, by virtue of its elder population, it should be looked to as a harbinger of trends in long-term care.

#### IV. CURRENT INITIATIVES TO IMPROVE CARE IN NURSING HOMES NATIONWIDE

It would be easy to attribute the massive punitive damage awards seen lately to the misfeasance of the long-term care industry, and conclude that the industry is merely being held accountable for their egregious conduct and that juries are sending a message that substandard care of our elderly will not be tolerated. But is it enough to hold the industry itself accountable, or are there other entities that bear some responsibility for the current abysmal state of America's nursing homes?

The United States General Accounting Office (GAO) has conducted several investigations over the past three years and found that nearly one-third of California's 1,370 nursing homes have been cited for violations classified as serious under federal or state standards.<sup>111</sup> Nationwide problems in compliance and enforcement are similar to California's. In testimony to Congress in 1999, the GAO reported that neither complaint investigation nor enforcement options were being used effectively and that serious problems in nursing homes go unre-

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108. *See id.*

109. *See* Aon Risk Consultants, Inc., *Florida Long Term Care General and Professional Liability Actuarial Analysis* (visited Apr. 5, 2001) <<http://www.fhca.org>>.

110. *See id.* at 12.

111. *See* U.S. General Accounting Office, *California Nursing Homes: Care Problems Persist Despite Federal and State Oversight*, GAO/HEHS-98-202, July 27, 1998. This report was support for testimony given on: *California Nursing Homes: Federal and State Oversight Inadequate to Protect Residents in Homes With Serious Care Violations*, GAO/T-HEHS-98-219, July 28, 1998, in which GAO noted that among other things, "despite the presence of a considerable federal and state oversight infrastructure, a significant number of California nursing homes were not and currently are not sufficiently monitored to guarantee the safety and welfare of nursing home residents." The report also found that even when violations are found, "California's DHS [Department of Health Services], consistent with HCFA's [U.S. Health Care Financing Administration] guidance on imposing sanctions, grants 98 percent of noncompliant homes a 30- to 45-day grace period to correct deficiencies without penalty, regardless of past performance." *Id.*

ported or uninvestigated.<sup>112</sup> These problems have existed due to combinations of poor state practices and limited Health Care Financing Administration (HCFA) guidance and oversight.<sup>113</sup> The lack of guidance and oversight has resulted in policies or practices that actually limit the number of complaints filed, allowed serious complaints to go uninvestigated for too long, and allowed compliance histories of homes and states' complaint investigation performance reports that were incomplete.<sup>114</sup> Further, GAO reported HCFA has not yet realized its goal of helping to ensure that homes maintain compliance with federal health care standards.<sup>115</sup> GAO also reports that there is a "yo-yo pattern" where homes continuously fall into and out of compliance; one-fourth of the nation's more than 17,000 nursing homes had serious deficiencies that included inadequate prevention of pressure sores, failure to properly assess residents' needs and provide correct care, often with serious consequences, and failure to prevent accidents.<sup>116</sup>

What is most striking about the reports on nursing home compliance is the recidivism of the violators and the ineffectiveness of sanctions. GAO testified that although most homes correct initial discrepancies, 40% of the homes with serious deficiencies are repeat violators.<sup>117</sup> Further, the threat of sanctions had little effect on the nursing homes due to the homes' ability to avoid actual fines as long as temporary fixes were made to correct the deficiencies.<sup>118</sup>

Based on complaints from families about conditions, as well as reports by GAO and other watchdog agencies, some states have begun to take action to address the myriad problems in the long-term care industry.<sup>119</sup> California Governor Gray Davis plans to introduce several measures that will increase fines for negligent care, provide higher pay for nursing home workers, and provide more inspectors to investigate complaints.<sup>120</sup> Under Davis' proposal, nursing homes that negli-

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112. See U.S. General Accounting Office, *Nursing Homes: Stronger Complaint and Enforcement Practices Needed to Better Assure Adequate Care*, GAO/T-HEHS-99-89, Mar. 22, 1999.

113. See *id.*

114. See *id.*

115. See *id.*

116. See *id.*

117. See *id.*

118. See U.S. General Accounting Office, *Nursing Homes: Stronger Complaint and Enforcement Practices Needed to Better Assure Adequate Care*, GAO/T-HEHS-99-89, Mar. 22, 1999.

119. See *infra* notes 120-131 and accompanying text.

120. See Robert Salladay, *Governor Gets Tough on Care for The Elderly*, S.F. EXAMINER, Jan. 9, 2000, at A1.

gently cause the death of a patient would be fined \$100,000, up from \$25,000, and fines for lesser offenses would be doubled from to a range from \$2,000 to \$20,000.<sup>121</sup> Under the new plan, nursing home workers would get an additional 5% raise on top of the 5% increase they received in 1999.<sup>122</sup> The cost of the pay raise would be \$68.5 million, but would help alleviate some of the difficulty that the health care industry has in attracting and retaining quality workers.<sup>123</sup> The plan also calls for fifty million dollars, mostly from federal sources, to train nursing home workers.<sup>124</sup> Davis also plans to add 200 new inspectors to augment the current staff of 253, with 133 of the new inspectors specifically detailed to providing surprise inspections of specifically-targeted low-performing homes under a pilot program that provides for state takeover of substandard homes.<sup>125</sup> The measures also seek to reduce the response time to complaints from ten days to forty-eight hours.<sup>126</sup>

Florida has also taken steps to rectify some of the longstanding problems in long-term care. Effective on July 1, 1999, Chapter 99-394<sup>127</sup> provides for a new system to detect problems earlier that includes the Florida Agency for Health Care Administration (AHCA) sending registered nurses they employ on unannounced visits to assess the quality of care at nursing homes,<sup>128</sup> and further makes it illegal for anyone to tip a home off about an impending visit.<sup>129</sup> Complaint response times are decreased from a maximum time of ninety days to sixty days.<sup>130</sup> While this is a significant improvement, it is still inadequate, especially as compared to the California proposal, and fails to acknowledge that once commenced, the degradation of health is rapid in the most at-risk elderly patients. If a complaint is lodged for egregious treatment, sixty days may be too long to wait to respond.

In addition to the reporting requirement changes, Florida has taken steps to address the problem of recruitment and retention of quality nursing home personnel. The state has allocated thirty-two million dollars to allow homes to voluntarily increase staffing, and has

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121. *See id.*

122. *See id.*

123. *See id.*

124. *See id.*

125. *See id.*

126. *See* Robert Salladay, *Governor Gets Tough on Care for The Elderly*, S.F. EXAMINER, Jan. 9, 2000, at A1.

127. FLA. STAT. ANN. § 400.0231 (West 1999).

128. *See id.*

129. *See id.*

130. *See id.*



provided incentive in a \$500 per day fine for nursing homes to not drop below required staffing levels.<sup>131</sup> Whether the allocation is enough, or enforcement for non-compliance occurs, will ultimately determine the efficacy of the initiative.

The federal government has also stepped up efforts to increase enforcement of nursing home standards. Former President Clinton issued orders to "get tough" on violators, resulting in five times as many fines being imposed in fiscal year 2000<sup>132</sup> as were imposed in 1996, 1,000 up from 1999.<sup>133</sup> The United States Court of Appeals for the Tenth Circuit recently affirmed a penalty of \$1,300 a day against a nursing home in Utah that had allowed patients to develop pressure sores, and another home in Cincinnati, Ohio was fined \$153,000 for unresponsiveness to patient needs and failure to properly care for pressure sores, incontinence and infections.<sup>134</sup>

Many of the homes found in violation of HCFA regulations are being held accountable under the False Claims Act,<sup>135</sup> which gives the Department of Justice the ability to prosecute substandard care that was reimbursed under the Act.<sup>136</sup> In Pennsylvania, two homes settled cases by paying fines of \$80,000 apiece, agreeing to temporary managers, and paying for federal monitors who will visit monthly to assess the quality of care.<sup>137</sup> A third home paid a \$60,000 fine and agreed to pay for \$100,000 in upgrades in lighting, air-conditioning, and other equipment.<sup>138</sup>

The government crackdown has also provided a deterrent to lax state officials and unscrupulous nursing home operators. Brent VanMeter, former deputy commissioner of the Oklahoma Health Department, and a nursing home owner were convicted of federal bribery charges in October 2000, in a case that involved certain nursing homes receiving favorable treatment in exchange for bribes.<sup>139</sup> Government diligence in all agencies with responsibility for nursing homes in any capacity will serve to improve care for the patients, improve use of taxpayer funding, and improve the industry itself.

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131. *See id.*

132. The Federal Government's fiscal year ends on September 30.

133. See Robert Pear, *U.S. Toughens Enforcement of Nursing Home Standards*, N. Y. TIMES (Dec. 4, 2000) <<http://www.nytimes.com/2000/12/04/national/04NURS.html>>.

134. *See id.*

135. 31 U.S.C.A. § 3729 (West 1994).

136. *See Pear, supra* note 133.

137. *See id.*

138. *See id.*

139. *See id.*

## V. ANALYSIS

Increased oversight, more frequent and rigorous inspections, training programs for nursing home workers, and increased fines will all help improve the standards of care in nursing homes.<sup>140</sup> However, these measures will still fall short if statutory punitive damage caps in nursing home negligence cases are not enacted. There are two considerations that must be part of the calculus of the health of the long-term care industry.

The unique nature of the industry is the most important concept when considering accountability of nursing homes. This is an industry that is absolutely vital on a personal level to not only the 1.6 million residents of nursing homes, but to their families as well. It is in the government's best interest that the industry be viable and healthy. In order to avoid a crisis in long-term health care, the government should necessarily turn to the industry. Industry profits, as long as they are realized after quality care is rendered, are key to the desire of the for-profit entities to continue in the business, to provide their investors and shareholders a reasonable return, to provide funds for capital improvements and equipment purchases as well as the building of new homes to meet the burgeoning demands of the coming decades.<sup>141</sup> Forcing nursing homes into bankruptcy due to massive punitive damage awards benefits no one.<sup>142</sup>

The second consideration must be that while nursing homes are held accountable for their actions, punitive damages must ultimately

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140. See *supra* notes 119-139 and accompanying text.

141. See Joseph T. Resor, *Troubled Times Don't Necessarily Mean Doom and Gloom*, NURSING HOMES, Mar. 1, 2000. Declining market capitalization in equity markets has retarded growth in building new long-term care facilities and upgrading existing buildings. See *id.* In 1996, the market capitalization for publicly held skilled-nursing home entities was \$13 billion, but by October 1999, that figure had fallen to only \$2.3 billion. See *id.*

142. Nursing home trade groups frequently point to cuts in Medicare disbursements as the primary reason for nursing home bankruptcies. See Florida Health Care Association, *Sixth Nursing Home Company Bankruptcy Places More Than 19,000 Florida Nursing Home Beds at Risk*, Jun. 23, 2000, (visited Apr. 16, 2001) <<http://www.fhca.org/fhca/news/presre16.php3>>. However, the General Service Administration (GAO) reported to Congress on September 5, 2000 that aggregate Medicare payments for covered nursing home costs are likely to cover those costs, and that nursing home operators have failed to reevaluate business policies, which more likely put financial strain on those long-term care operations. See U.S. General Accounting Office, *Nursing Homes: Aggregate Medicare Payments Are Adequate Despite Bankruptcies*, GAO/HEHS-00-192, Sep. 5, 2000. The truth perhaps lies in between the industry view and that of the GAO. The Aon Risk Consultant report found that while the Medicare reimbursement rate in Florida had gone from \$86 per day in 1995 to \$114 per day in 2000, the increase has been totally unrealized as profit due to rising liability costs. See Aon Risk Consultants, Inc., *Florida Long Term Care General Liability and Professional Liability Actuarial Analysis* (visited Apr. 5, 2001) <<http://www.fhca.org>>.

advance the legitimate state interest in punishment and deterrence.<sup>143</sup> The punishment effect of massive punitive damages is unquestionable, and should neither be excessive nor enter the "zone of arbitrariness" that is violative of the Due Process Clause.<sup>144</sup> Punitive damages should also serve the legitimate state interest of deterring incidents of the type that have been seen. Many of these cases seem to accept deterrence as a legitimate state interest without scrutiny.

Cases that reach a jury depicting graphic, heart-wrenching evidence about the maltreatment and neglect of an elder person at the hands of a nursing home do not happen by accident. This author argues that much of the negligence occurring in the nation's nursing homes is at least partially attributable to the woefully inadequate government oversight of nursing homes at both the state and federal level.<sup>145</sup> In *Spilman*, the court found that the nursing home knew when inspections would be conducted, and increased staffing, cleanliness, and the overall appearance of the facility in anticipation.<sup>146</sup> One wonders how Mr. Spilman would have been treated had the state of Florida been conducting surprise inspections as they now plan to do. From the *Spilman* case on, Florida, and indeed the rest of the nation, was on notice that the system designed to protect some of the weakest of our society was not working. The judges in *Spilman* castigated the defendants, but mention nothing of the responsibility of the state.<sup>147</sup> If the state of Florida, as the court found,<sup>148</sup> was so remiss in their duty of inspection, then was there truly a legitimate state interest shown?

The question of punitive damages in nursing home negligence cases must inquire as to whether a legitimate state interest exists if the state never acted in its regulatory capacity to prevent the occurrence of an event which prompted the cause of action that results in the punitive damages. In other words, was the defendant on notice that their actions were so egregious as to warrant a multimillion dollar punitive award if they had never even been fined a few thousand dollars for that conduct?<sup>149</sup> From the standpoint of the victims of nursing

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143. See *BMW of North America v. Gore*, 517 U.S. 559, 568 (1996).

144. See *id.*

145. See *supra* notes 111-118 and accompanying text.

146. See *Beverly Enterprises-Florida v. Spilman*, 661 So. 2d 867, 871 (Fla. Dist. Ct. App. 5th Dist. 1995).

147. See *id.* at 874. In a special concurrence Judge W. Sharp comments that "I only write to say we should never cease to be shocked by Man's inhumanity to Man. . . ." *Id.*

148. See *id.* at 871. In the home where Spilman was cared for, the court found that advance notice of inspections was used to clean up the home. See *id.* Yet, nowhere in its opinion does the court take the state to task for a system that allows word of impending inspections to leak out.

149. See *BMW*, 517 U.S. at 584.

home neglect and their families, a timely, conscientious inspection by state regulators who impose a fine, and then ensure collection of the fine is preferable to the death of the victim and a lawsuit to remedy the damages.

As punitive damages are capped in cases of maltreatment of elderly patients by statute, the fines levied should increase. As indicated, the fines imposed by the federal government have the effect of changing nursing home behavior, but it is the support of the fines with scrutiny and oversight that forces the nursing homes to come up to standards.<sup>150</sup> Additionally, by forcing a nursing home to spend its money on infrastructure improvements, instead of that money going to the estate of a decedent and the estate's lawyer, government action directly improves the quality of life for the residents. This method also allows plaintiffs to prove adequate notice using the standard in *BMW*. Nursing homes that have already paid fines will be on notice of the severity or the reprehensibility of the offense.<sup>151</sup> With caps on punitive damages in place, the disparity between actual damages and punitive damages will be lessened,<sup>152</sup> and the difference between the penalties in civil cases and any punitive damage award will be reduced.<sup>153</sup>

Another consideration regarding punitive damages is where those damages go when paid. Most states have some provision for at least a portion of the damages to go to the state in some form. In Florida, for example, only 40% of any punitive damage award goes to the injured party.<sup>154</sup> If the cause of action is based on wrongful death or personal injury, the remaining 60% goes to the Public Medical Assistance Trust Fund, otherwise the monies go to the General Revenue Fund.<sup>155</sup> It must be remembered that in Florida many of the nursing home negligence suits are patient's rights causes of action, and not personal injury or wrongful death, which do have statutory caps on punitive damages. It would be sound policy to create a Nursing Home Trust Fund from punitive damages that are awarded in nursing home negligence cases. Under such a scheme, 50% of the punitive damage award would go to the fund if the plaintiff is surviving, but 90% would go to the fund if the plaintiff is a relative or the estate of the victim. With the money flowing into state coffers as a result of these punitive

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150. See *supra* notes 135-138 and accompanying text.

151. See *BMW*, 517 U.S. at 575.

152. See *id.*

153. See *id.*

154. See RICHARD L. BLATT ET AL., PUNITIVE DAMAGES 159 (1991).

155. See *id.*

damage awards that arguably are the partial result of the state's failure to police the nursing home industry, it begs the question of whether states have been indirectly enriched by and through the suffering of those they had a duty to protect.

### CONCLUSION

Punitive damages are a reactive correction for egregious behavior. Stiff fines, properly applied, and diligent oversight by the government are pro-active preventative measures that will save lives. The federal government and the states must exert a concerted effort to provide meaningful oversight of nursing homes, and properly apply sanctions when needed to assure that "older Americans" receive the best care possible. Additionally, the government must form a partnership with the long-term care industry that defines each other's roles and engenders a spirit of cooperation. The United States can ill-afford any additional time wasted on ineffective oversight or negligent nursing home operations.

Punitive damages that are tens of millions of dollars do not benefit anyone but the plaintiff's lawyers.<sup>156</sup> While damages of that magnitude cause nursing homes to take notice, often the absurdity of the award obscures the message the jury is attempting to send. For the affected nursing home, an award of this magnitude signals costly appeals, reductions in spending for patients and staff, or in some cases, bankruptcy.<sup>157</sup> Often all three results occur. It cannot be best for the patients they serve or the community in which they operate for a nursing home to have to pay out a multimillion dollar award. If the long-term care entity goes out of business the residents will have to find new places to live, or perhaps the government will step in. Governmental takeover of a nursing home, however, guarantees no better treatment, and possibly any neglect in a governmental run home would not be actionable under the doctrine of sovereign immunity.<sup>158</sup>

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156. See Julie Appleby, *Litigation Grows in Ailing Nursing Home Industry*, USA TODAY, Jun. 19, 2000, at B8. In Florida, suing nursing homes has become a legal specialty, with leading plaintiff's attorneys from Florida opening branch offices in Texas, Alabama, and Tennessee. *Id.*

157. See *supra* notes 103-109 and accompanying text. See *supra* note 142.

158. See Carter, Jr. Administrator of the Estate of Vance Carter v. Chesterfield County Health Comm'n, 527 S.E. 2d 783 (Va. 2000) where the Virginia Supreme Court affirmed dismissal of a suit against a county-run nursing home, holding that the home was under the umbrella of sovereign immunity because the operation of a nursing home was a government function, and in effect a "police power" for the common good, and thus not a proprietary function.

As the case law illustrates, there is no substitute for frequent inspections which probably could preclude some of the pain and suffering and early death described. Additionally, the massive awards have continued to grow unabated despite the previous awards, so the deterrent effect is lost. It is presumably more of a deterrent to any business to have diligent, qualified government officials closely scrutinizing the business' actions.

Without cessation of the giant punitive damage awards, it is clear that there may soon be no insurers left to provide liability insurance to nursing home. With deductibles as high as \$250,000 per incident<sup>159</sup> and annual premiums in excess of \$200,000<sup>160</sup> it may eventually be more cost effective for a nursing home to risk not having liability insurance coverage and save the money since one incident might well mean a cost of \$500,000 when including premiums in a given year.

Without some kind of statutory brake, the financial woes incurred from punitive damages will leave the nursing home industry in shambles. Already companies which own one-fifth of the beds serving Florida's 84,000 nursing home residents are under Chapter 11 bankruptcy protection, with about 100 facilities near closure.<sup>161</sup>

Legislative efforts and regulatory efforts are providing some modicum of relief and may signal the beginning of a turnaround in the nursing home industry, but the specter of massive punitive award damages will continue to be a potential cost that saps resources from nursing homes budgets in the form of higher insurance premiums and attorneys fees. Assistance with recruitment and retention of registered nurses, licensed practical nurses, and Certified Nurse Assistants (CNA) is crucial. These shortages are most crucial among CNAs who work at nursing homes, and these shortages have been linked to abuse and neglect of patients.<sup>162</sup>

Surprise inspections and fines that are not only imposed, but collected, also appear to be providing better care to patients, which ulti-

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159. See Mary Ellen Klas, *Many Nursing Home Insurers Leaving State*, PALM BEACH POST, Sept. 22, 2000, at 1D.

160. See Best's Ins. News, *Long-Term-Care Liability Market Continues to Shrink*, Sept. 25, 2000.

161. See Adam Miller, *Angels of Death* (visited Feb. 22, 2001) <http://www.floridabiz.com/cgi-shl/shownews.pl?id=6936>.

162. See Jennifer Steinhauer, *Shortage of Health Care Workers Keeps Growing*, N. Y. TIMES, Dec. 25, 2000, <<http://www.nytimes.com/2000/12/25/nyregion/25/HEAL.html>>. The article also reports that patient to nurse ratios in the New York City area that used to be 7:1 are now routinely 10 or 11:1 on day shift and as high as 40:1 on the night shift. Additionally, it is taking about nine months to fill positions that used to take three to six months to fill in the past.

mately benefits the nursing home industry.<sup>163</sup> As long as the industry remains a for-profit business, it will be imperative that the public is confident in the government's ability to police the industry. If nursing homes are closely watched, and fail to comply with government regulation, then the government must step in to hold nursing home administrators personal liable and enforce criminal sanctions against those who harm elderly patients or those in authority who knowingly fail to stop the abuses. The needs of the patient, which necessarily include the home in which they live staying open, must be the first priority. Statutory caps on punitive damages will go a long way in aiding a beleaguered industry to remain viable to serve the needs of the present while preparing for the increased needs of the future. The American public can no longer accept government that reacts at a glacial pace to nursing home abuses and waits for the courts to rectify the injustice, but must demand a pro-active approach that prevents abuse from ever happening.

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163. See *infra* notes 133-139 and accompanying text.