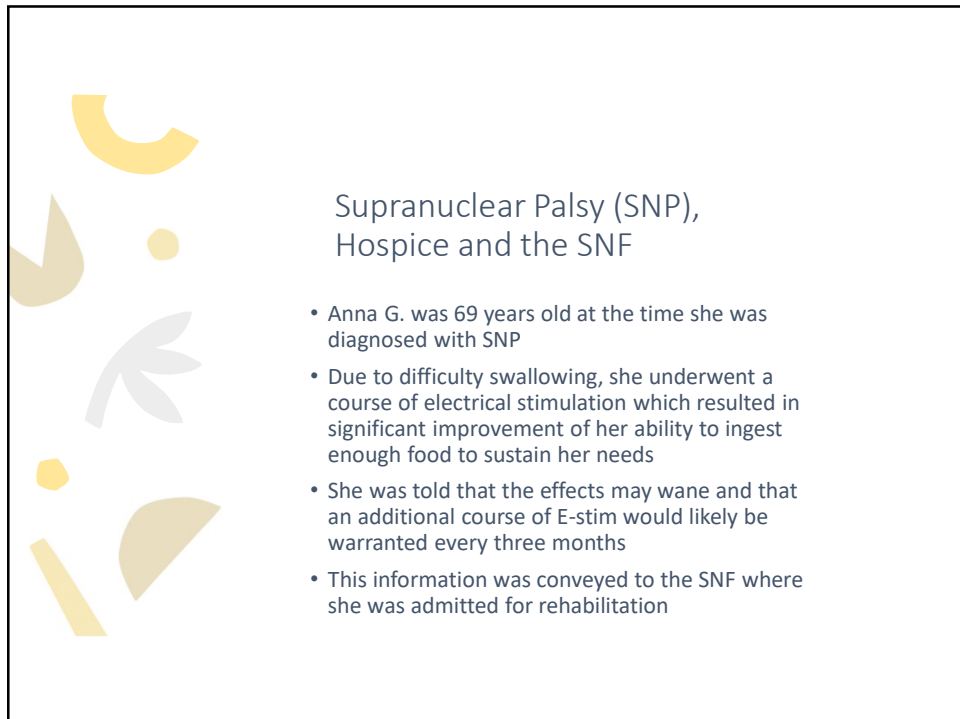




HCCA Healthcare Enforcement  
Compliance Conference  
**201 Enforcement, Compliance,  
and Long-Term Care- Case Study**

Ilene Warner-Maron  
PhD, RN NHA FCPP  
Assistant Professor, Department of Geriatrics and Palliative Medicine  
Philadelphia College of Osteopathic Medicine


1



Supranuclear Palsy (SNP),  
Hospice and the SNF

- Anna G. was 69 years old at the time she was diagnosed with SNP
- Due to difficulty swallowing, she underwent a course of electrical stimulation which resulted in significant improvement of her ability to ingest enough food to sustain her needs
- She was told that the effects may wane and that an additional course of E-stim would likely be warranted every three months
- This information was conveyed to the SNF where she was admitted for rehabilitation

2




## The Course of Treatment

- Physical, occupational and speech therapies were provided to Anna G. under Medicare at the SNF in combination six days per week
- The diagnosis of SNP had little to no impact on her ability to ambulate or transfer, however the physical therapist continued to work with the resident 3-5 days per week for three months
- Ms. G. was able to self-feed, bathe and perform her hygiene needs, however occupational therapy continued to provide services 3-5 days per week for three months
- The Speech and language pathologist (SLP) worked with Anna G. on swallowing strategies, recommending a mechanical soft diet with thin liquids

3

## More Treatment

- As the effects of the E-stim began to wear off, Anna G. experienced increasing difficulty swallowing
- Food literally went in and came out as the resident was increasingly unable to swallow, however none of the health care providers offered E-stim or referred Ms. G. to a provider who could perform this service
- The SLP continued to treat the resident 3-5 times per week for three months, downgrading her diet to pureed as Anna G. was increasingly unable to swallow
- As a consequence, Ms. G. lost 12% of her body weight from the second month of her residency to the third month of her residency, a loss consistent with the CMS definition of weight loss



4

## Even More Treatment

- It became increasingly more time consuming for the staff to assist Anna G. with her meals due to progressive dysphagia
- None of the SLP's strategies were successful as Ms. G. was increasingly unable to swallow
- Once Anna G.'s 100 days of Medicare was exhausted, PT, OT and SLP interventions stopped, and the resident was referred to one of two hospices that serviced the SNF
- Hospice Provider 'A' was selected because that hospice provided home health aides 5 days per week whereas other hospices could not guarantee this level of aide service



5

## Hospice Services

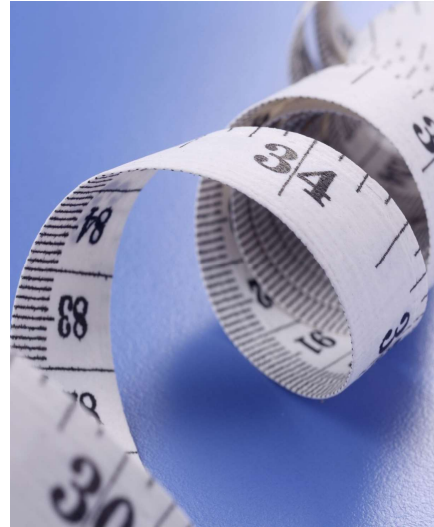
- The SNF referred the resident for hospice services based on her diagnosis of SNP, despite knowing that an intervention that had been used prior to admission had been successful and was expected to be repeated every three months
- The family was told that hospice was appropriate and that they would no longer have to pay for many of her medications and supplies if they agreed to hospice
- The hospice was made aware of the success of E-stim by Ms. G.'s family however that was not reflected in their documentation or conveyed to either of the physicians who certified the patient for hospice services under Medicare
- Although the licensed hospice nurses were to provide visits once a week and were to assess the resident's PPS (Palliative Performance Scale), obtain vital signs, obtain a weight or MUAC measurement (mid upper arm circumference) and assess the patient for the need for DME (durable medical equipment), the nurses did not follow their own visit pattern or document the assessment of Ms. G.'s needs



6

## Malnutrition and a Pressure Injury

- As a consequence of Anna G.'s inability to eat sufficient amounts of food, particularly protein, she developed a significant sacral pressure injury
- The standard of care required weekly assessments of the wound including measurements of the length, width and depth; a description of the tissue in the wound; odor, drainage and pain;
- The hospice nurses did not perform weekly wound assessments, nor did the SNF staff
- The SNF requested a low air loss mattress from hospice, however it was not delivered



7

## Discussion Points

Was the use of PT/OT/SLP for 100 days justified?

What possible reasons would the SLP not recommend the resident receive another course of E-stim for the treatment of dysphagia?

Was Ms. G. appropriate for hospice services if a viable treatment was available and effective?

Was the family encouraged/enticed to agree to hospice for financial reasons rather than the terminal diagnosis of SNP?

Should the hospice receive reimbursement for their services if the visit pattern was not followed and the assessment did not include the necessary collection of data to justify continued care?

What was the financial benefit of the SNF in referring the resident to Hospice Provider 'A'?

8

## Discussion Points



If the physicians who certified the resident as hospice appropriate knew that Anna G. had been successfully treated with E-stim, would they have agreed that she required hospice-level care?



What red flags should have been identified?



Who was responsible for the documentation of weekly wound assessments?



What entity was responsible for obtaining a low air loss mattress?



Was fraud committed? If so, by which party(s)?

9



**NEW YORK STATE  
MEDICAID FRAUD CONTROL UNIT**  
LETITIA JAMES  
ATTORNEY GENERAL OF THE STATE OF NEW YORK

Paul J. Mahoney, Ass't Deputy Attorney General

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# Overview of New York MFCU

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## MFCU Mission

- Prosecute Abuse and Neglect of Nursing Home Residents
- Prosecute and Sue Providers who Defraud Medicaid
- Protect the Integrity of the Medicaid Program

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Report of NYS Commission  
on Nursing Homes and Residential Facilities

1. "The nursing home patient is not a true consumer with choices which encourage good and discourage bad providers. ... When the government fails such "consumers" they get a raw deal while the suppliers frequently get rich."
2. "When government funds flow in ever increasing sums, there is no assurance of anything except there will be a sufficiency of outstretched hands to receive the money. That the hands perform depends on government regulators."

13

Report of NYS Commission  
on Nursing Homes and Residential Facilities

**October 1975**

1. "The nursing home patient is not a true consumer with choices which encourage good and discourage bad providers. ... When the government fails such "consumers" they get a raw deal while the suppliers frequently get rich."
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## Who Depends on Us?



90,000 nursing home residents statewide

... and their families & friends

7,000,000 Recipients

1000's of honest providers who play by the rules

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## Who Do We Investigate?

- Not Recipients
- Not Neighborhoods
- Not Policies
- We Investigate "Providers"

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## MFCU Staffing Groups

### Attorneys

- Investigative attorneys with expertise in litigating civilly and prosecuting resident abuse and provider fraud.

### Detectives

- All MFCU investigators are police officers.
- Trained in fraud and abuse and neglect investigations.

### Forensic Auditors

- Accountants trained to review books and records of businesses

### Nurse Experts

- Experience includes Director of Nursing, Compliance, Risk Management, Unit Supervisor.
- Review resident records, staffing, conduct interviews. Define standards of care.

### Data Analytics

- Experienced data scientists with expertise in analyzing many types of data from various databases.

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## Fun Facts: Did You Know?

- MFCU was the first and is the largest MFCU in the nation, and brings the most complex, comprehensive fraud and patient abuse and neglect cases
- MFCU is the largest bureau in the Attorney General's Office - Criminal Justice Division, with 260+ employees

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## Patient Abuse is One of the Most Underreported Crimes in the Nation

Victims often:

- cannot physically defend themselves,
- do not have the ability to communicate,
- are unable to recall the abuse,
- may be reluctant to report due to fear of retaliation.

That is why the law has special protections for institutionalized patients.



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## Nursing Homes Have Legal Duties to Residents:

“A license to operate a nursing home carries with it a special obligation to the residents who depend upon the facility to meet every basic human need.”

10 NYCRR § 415.1(1)(a) (emphasis added).



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## Obligation re: Quality of Life and Medical Care

- A facility must treat each resident with respect and dignity and care for each resident in a manner and in an environment that promotes maintenance or enhancement of his or her quality of life. 42 CFR § 483.10(a)(1); 10 NYCRR 415.12.
- Each resident shall have the right to:
  - adequate and appropriate medical care . . . 10 NYCRR § 415.3. *See also* 42 CFR § 483.10(d)(2).



## Facility Must Provide Activities of Daily Living

The facility must provide care and services. . .for the following activities of daily living:

- (1) Hygiene - bathing, dressing, grooming, and oral care,
- (2) Mobility - transfer and ambulation, including walking,
- (3) Elimination - toileting,
- (4) Dining - eating, including meals and snacks.



## Nursing Homes Must Have Sufficient Staff

The facility shall provide services by sufficient personnel on a 24-hour basis to provide nursing care to all residents in accordance with resident care plans. 10 NYCRR § 415.13(a).

Staff qualifications and personnel management. The nursing home shall employ on a full-time, part-time or consultant basis a **sufficient number of professional staff members** who are educated, oriented and qualified to carry out the provisions of this Part and to assure the health, safety, proper care and treatment of the residents. 10 NYCRR §415.26(c)

The facility must have sufficient nursing staff with the appropriate competencies and skills sets to provide nursing and related services to assure. . .the well-being of each resident. 42 CFR § 483.35.



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## Home Must Limit Admissions: Ability to Provide Care

(1) The nursing home shall: (ii) accept and retain only those nursing home residents for whom it can provide adequate care . . .

*See 42 CFR §483.25 / 10 NYCRR § 415.26*



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## Resident Bill of Rights

The right to receive courteous, fair and respectful treatment.



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## Attorney General's Nursing Home Report January 2021

<https://ag.ny.gov/sites/default/files/2021-nursinghomesreport.pdf>

- Preliminary Findings, e.g.:
- Nursing homes that entered the pandemic with low U.S. Centers for Medicaid and Medicare Services Staffing ratings had higher COVID-19 fatality rates.
- Nursing homes' lack of compliance with infection control protocols put residents at increased risk of harm
- State reimbursement model for nursing homes gives a financial incentive to owners of for-profit nursing homes to transfer funds to related parties (ultimately increasing their own profit) instead of investing in higher levels of staffing and PPE
- **Regulatory Framework Section sets forth New York and Federal law on Nursing Home Duties to Residents (pp. 43-47).**
- Appendix B discusses Focus Prosecution and Parallel Civil Settlement through AOD (pp. 63-67).



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Worker are sometimes afraid that they will lose their job if they report.

- Both federal and state law prohibit an employer from harassing, denying an employee benefit or otherwise retaliating against any person who makes a report of resident abuse or neglect.
  - Knowing retaliation could be a crime.
    - PHL §§ 2803-d(8) and 12-b(2).
  - Facility could be subject to a fine of up to \$200,000 and exclusion.
    - 42 USC 1320b-25(d)(1).

*Also, an employee's cover up to try to help the facility usually results in the employee being held accountable.*



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## MFCU Prosecutions and Civil Remedies to Address Resident Abuse and Neglect, and Provider Fraud in Nursing Homes



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# Newsday

LONG ISLAND

## 5 Ex-workers at Medford Nursing Home Get Jail Time in Patient's Death

October 28, 2015



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### AOD With Medford Owners (2016 to 2023)

#### Civil Action against Facility and Owners +

Parallel Criminal Prosecution of Nursing Home, RT, & 2 RNs for Criminally Negligent Homicide/Endangering and of Administrator, RT and 2 LPNs for Cover-Up of Neglect Resulting in Death

- Repayment of \$10M to Medicaid
- Resident Care Fund of \$6M
  - Independent Financial Monitor
- Higher Levels of Care & Staffing
- Independent Care Consultant
- Governing Body
- Mandatory Extension of Agreement for Noncompliance
- Terms Continue to Bind Any New Owners
- Limit on Agency Staffing
- Full-time Compliance & Risk Management officer
- Training and New Policies



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MFCU prosecutions and civil actions address systemic causes of abuse and neglect improved care for hundreds residents at facilities.



### New York Executive Law § 63(12):

“Whenever any person shall engage in repeated fraudulent or illegal acts or otherwise demonstrate persistent fraud or illegality in the carrying on, conducting or transaction of business, the attorney general may apply, in the name of the people of the state of New York, to the supreme court of the state of New York...for an order enjoining the continuance of such business activity or of any fraudulent or illegal acts, directing restitution and damages...”



## NY AG Filed 3 Executive Law § 63(12) Special Proceedings in 2022

- November 29, 2022: Orleans County: The Villages of Orleans, a for-profit 120-bed nursing home:
  - Verified Petition
  - 14 Affidavits, including Auditor Affidavit, Medical Analyst Affidavit, Detective Affidavit and Civilian Affidavits
  - Memorandum of Law
  - Notice of Petition
  - 17 Respondents
  
- December 13, 2022: Nassau County: Fulton Commons, a for-profit 280-bed nursing home, in East Meadow
  - Verified Petition
  - 13 Affidavits, including Auditor Affidavit, Medical Analyst Affidavit, Detective Affidavit and Civilian Affidavits
  - Memorandum of Law
  - Notice of Petition
  - 19 Respondents: Nursing Home, 14 individuals including 12 nursing home owners, 4 other corporate entities including related party landlord and management company
  
- December 15, 2022: Nassau County: Cold Spring Hills, a for-profit 588-bed nursing home in Oyster Bay
  - Verified Petition
  - 21 Affidavits, including Auditor Affidavit, Medical Analyst Affidavit, Detective Affidavit and Civilian Affidavits
  - Memorandum of Law
  - Notice of Petition
  - 27 Respondents: Nursing Home, 12 LLCs, 1 other corporate entity, 14 individuals, including owners of nursing home and related party landlord and management companies



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## Attorney General's Executive Law § 63(12) Special Proceeding Against Villages of Orleans, et al.

Verified Petition re:  
Villages of Orleans,  
a 120-bed facility  
(151 pages),  
Filed 11/29/22

**17 Respondents:**

5 Corporate Persons:  
Nursing Home, and 4  
other corporate persons,  
including related party  
landlord and  
management company, and

12 Individuals who are  
their owners



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Letitia James

FILED: ORLEANS COUNTY CLERK 11/29/22 10:46 AM INDEX NO. E22-00582  
NYSCEF DOC. NO. 1 RECEIVED NYSCEF: 11/29/2022

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ORLEANS

-----X

PEOPLE OF THE STATE OF NEW YORK,  
by LETITIA JAMES, Attorney General  
of the State of New York,

Petitioner, Index No. \_\_\_\_\_

**VERIFIED PETITION**

- against -

COMPREHENSIVE AT ORLEANS LLC d/b/a  
THE VILLAGES OF ORLEANS HEALTH AND  
REHABILITATION CENTER, TELEGRAPH REALTY  
LLC, CHMS GROUP LLC, VILLAGES OF ORLEANS  
LLC, ML KIDS HOLDINGS LLC, BERNARD FUCHS,  
JOEL EDELSTEIN, ISRAEL FREUND,  
GERALD FUCHS, TOVA FUCHS, DAVID GAST,  
SAM HALPER, EPHRAM LAHASKY,  
BENJAMIN LANDA, JOSHUA FARKOVITS,  
TERESA LICHTSCHEIN, and DEBBIE KORNGUT,

Respondents. -----X

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**Amputee Sits in Urine, Awaiting Medication:** Resident 43 was admitted to The Villages in late 2020 after a leg amputation in order to regain enough strength to use a prosthetic leg and live independently. During his three-month stay at The Villages, Resident 43 had few physical therapy sessions, which he described as “laughable.” In the Physical Therapy room, he was left to sit without exercise. Due to his amputation, Resident 43’s care plan called for two staffers to assist him with cleaning himself, but staff frequently failed to timely change his adult diaper and, as a result, he often sat in a puddle of his own urine for hours. When interviewed in March 2022, Resident 43 was living at a different facility and reported he was “making great progress.” He stated that if he had received proper treatment and care at The Villages, he “would be back home by now.” (Detective Aff. ¶¶ 175-194; Medical Analyst Aff. ¶¶ 33-37.)

p. 5, 32, 62-127):

**“Wouldn’t put a dog in Villages”:** Resident 50 arrived at The Villages in December 2020 for rehabilitation after knee surgery. During a video call, Resident 50’s wife saw he was lying in bed with only a diaper on, atop a rubber mat, without sheets or blankets. Resident 50’s wife found bruises on his head, face, and arms, yet The Villages did not notify her about or explain these injuries. At The Villages, Resident 50 became “a stranger” to his wife, and “could not communicate verbally.” After his wife transferred Resident 50 to a different facility, he was able to eat, talk, and laugh again. Resident 50’s wife now holds that she “wouldn’t put a dog in Villages.” Resident 50 passed away in November 2021 from COVID-19. (Affidavit of Margarete Volkmar [“Volkmar Aff.”] ¶¶ 7-

B. The Villages Does Not Create, Follow, and Update Residents’ Care Plans, Leading to Resident Harm, Accidents, and Injuries.



G. Respondents Continued to Pressure Staff to Admit New Residents Despite Knowing The Villages Did Not Provide for Residents’ Basic Needs.

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- “The Villages intentionally maintained chronically inadequate staffing levels in order to maximize Respondents’ profits” ... “deprive[d] healthcare workers of the resources and supervision needed to succeed” and “pressured or forced staff to . . .”

12. Moreover, The Villages intentionally maintained chronically inadequate staffing levels in order to maximize Respondents’ profits, and pressured or forced staff to: (1) perform work outside the scope of their qualifications; (2) work without adequate support from other personnel; and (3) work under substandard conditions, all while being paid low wages (*see* pp. 93-106). Indeed, Petitioner recognizes that Respondents will likely argue that the allegations herein are the result of negligent and lazy direct care staff. To the contrary, however, Petitioner’s extensive investigation found that the Respondents themselves are responsible for egregious conditions at The Villages, including through their intentional and reckless decision to deprive healthcare workers of the resources and supervision needed to succeed.



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- Findings:**
- Staffing Cuts After Purchase in 2015,
  - Followed by Decreases in all CMS ratings, to lowest levels,
  - Immediate Jeopardy May 2020; March 2021 CMS Designated Special Focus Facility
  - Repeated and persistent fraud and illegality through Illegal Conversion of \$18.6 million in up-front profit through self-dealing lease with related party landlord, and management fees, including \$10M before 2020

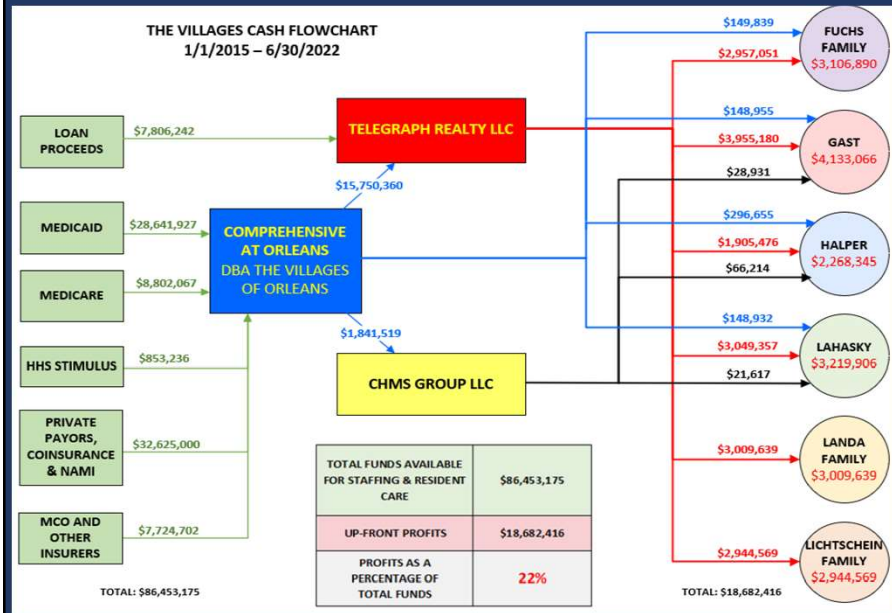
7. Respondents' persistent violations of their duty to care for The Villages' residents began long before the COVID-19 pandemic, and continue to the present.<sup>4</sup> Almost immediately after Respondents took control of The Villages in January 2015, The Villages' Five Star quality ratings plummeted, becoming among the worst in the State. In May 2020, the New York State Department of Health ("DOH") declared The Villages to be in "Immediate Jeopardy" for violating COVID-19 protocols, causing or likely causing, "serious injury, harm, impairment, or death to a resident."<sup>5</sup> (See 42 CFR § 488.301 [defining "Immediate Jeopardy"].) Less than a year later, in March 2021, the U.S. Centers for Medicare and Medicaid Services ("CMS") designated The Villages as a Special Focus Facility, a designation reserved for the poorest performing nursing homes in the country.<sup>6</sup> As shown below, the Attorney General's Medicaid Fraud Control Unit ("MFCU") has determined that The Villages' egregious mistreatment of residents continues to date and has seemingly not been deterred by Petitioner's investigation, and other repeated notifications of deficiencies, including DOH surveys, consultant reports, news media

8. Neglect and mistreatment of The Villages' residents could have been prevented by Respondents' appropriate investment in resident care and staffing. Instead, as the below cash flow chart illustrates, the funds paid to The Villages and Respondents' real property holding company, Telegraph Realty LLC ("Telegraph"), including tens of millions of dollars in taxpayer funds to provide healthcare to vulnerable residents, flowed from The Villages' and Telegraph's bank accounts to Respondents' bank accounts, resulting in over \$18.6 million in "up-front profit."<sup>7</sup> Critically, Respondents did not re-invest these funds to improve the building, operations or quality of life and care for residents at The Villages. Respondents' looting of The Villages began well before the onset of the COVID-19 pandemic. Of the over \$18.6 million in "up-front profit" shown below, Respondents took over \$10 million before 2020 – leaving the facility in a precarious position to face the COVID-19 pandemic. Respondents achieved this through, among other things, causing The Villages to pay an outsized portion of its annual revenue to Telegraph in the form of inflated "rent" payments, dwarfing the percentage of revenue allocated to rent as similarly situated

Moreover, this looting of The Villages' funds continues to the present day, while residents at The Villages continue to suffer.

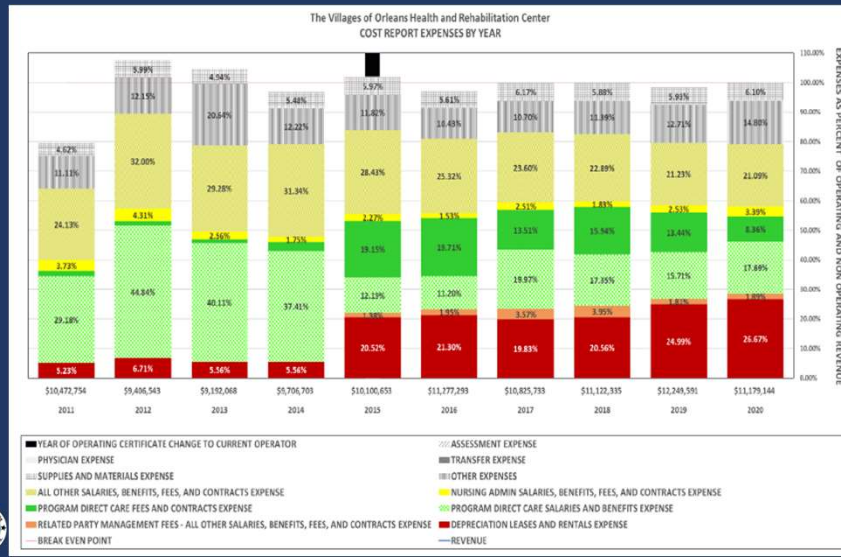
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**Financial Findings: Illegal Conversion of \$18.6 Million:**



Executive Law § 63(12) Special Proceeding re: The Villages of Orleans, Filed 11/29/22

Respondents' fraudulent conduct gave the false impression The Villages was not a profitable investment for Respondents: - red is the increase in "rent" expenses  
 - light green shows decrease in direct care staffing expenses



Executive Law § 63(12) Special Proceeding re: The Villages of Orleans, Filed 11/29/22

Respondents' Fraudulent Conduct included Hiding the facility's True Owners and Operators from DOH (p. 11);

**I. Respondents Gast, Halper, and Lahasky Are De-Facto Owners of The Villages and Abdicated Their Responsibility to Provide Adequate Care; Other Respondents Contributed Nothing and Made Millions.**

49. Respondents falsely listed Bernard Fuchs as 100% owner of The Villages in submissions to DOH and on corporate organizing documents in an intentional scheme to mislead DOH about the identities of the individuals who planned to, and did in fact, exercise control over The Villages from day one – all in an effort to evade DOH scrutiny and fast track licensing. In

-Respondent Bernard Fuchs agreed to put his name on the CON application to induce DOH to approve it quickly. Respondents also misled DOH about the collusive lease (pp. 121-127);

-Respondents Halper, Lahasky and Gast controlled The Village's finances, staffing, budgeting and high-level decision-making, (pp. 23-27), e.g.,  
 -They controlled and were signatories on its bank accounts, and payments for rent and management services; Gast entered into contracts for laboratory testing; Lahasky signed its Purchase & Sale Agreement, held himself out to the IRS as its sole member, and signed its Medicaid billing certification.

## HCCA Healthcare Enforcement Compliance Conference

Enforcement, Compliance, and Long-Term Care

David Hoffman, JD, FCPP  
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November 6, 2023

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## Nursing Home Compliance Regulations

- **483.85 Compliance and ethics program.**

(a) **Definitions.** For purposes of this section, the following definitions apply:

*Compliance and ethics program* means, with respect to a facility, a program of the operating organization that—

- (1) Has been reasonably designed, implemented, and enforced so that it is likely to be effective in preventing and detecting criminal, civil, and administrative violations under the Act and in promoting quality of care; and
- (2) Includes, at a minimum, the required components specified in [paragraph \(c\)](#) of this section.

- **High-level personnel** means individual(s) who have substantial control over the operating organization or who have a substantial role in the making of policy within the operating organization.

- *Operating organization* means the individual(s) or entity that operates a facility.

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## Nursing Home Compliance Regulations

(2) Assignment of **specific individuals within the high-level personnel** of the operating organization with the overall responsibility to oversee compliance with the operating organization's compliance and ethics program's standards, policies, and procedures, such as, but not limited to, the chief executive officer (CEO), members of the board of directors, or directors of major divisions in the operating organization.

(3) Sufficient resources and authority to the specific individuals designated in [paragraph \(c\)\(2\)](#) of this section to reasonably assure compliance with such standards, policies, and procedures.

Section 483.85c (2), (3)

**How is the required oversight being accomplished?**

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## Regulatory requirements for 5 or more nursing homes

- A designated compliance officer for whom the operating organization's compliance and ethics program is a major responsibility. **This individual must report directly to the operating organization's governing body and not be subordinate to the general counsel, chief financial officer or chief operating officer.**
- (3) Designated compliance liaisons located at each of the operating organization's facilities.

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## Governing Body--42 CFR § 483.70(c) (Administration)

**(1) The facility must have a governing body, or designated persons functioning as a governing body, that is legally responsible for establishing and implementing policies regarding the management and operation of the facility; and**

**(2) The governing body appoints the administrator who is—**

**(i) Licensed by the State, where licensing is required;**

**(ii) Responsible for management of the facility; and**

**(iii) Reports to and is accountable to the governing body.**

**(3) The governing body is responsible and accountable for the QAPI program, in accordance with § 483.75(f).**

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## Ethics and Compliance Officer Role

- Who are you reporting to?
- With what frequency?
- Do you have authority to act?
  - How?
  - In what types of cases?

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## The Business of Nursing Home Ownership/Operations: Compliance Perspective

### **Triple Net leases**

- Landlord has shifted significant financial burdens on Tenant/Operator
- Exorbitant rent with annual escalator clauses
- Taxes
- Insurance
- Costs of property maintenance and improvements (required approval by Landlord)
- Rent is Absolute without right to reduction for material defects and damages
- Waiver of any right to abatement
- No concern for quality of care

### **What can the Chief Ethics and Compliance Officer Do?**

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## For-Profit Model

- The current state reimbursement model for nursing homes gives a financial incentive to owners of for-profit nursing homes to transfer funds to related parties (ultimately increasing their own profit) instead of investing in higher levels of staffing and PPE.

NY Attorney General Office Report, *"Nursing Home Response to COVID-19 Pandemic"*, January 2021

- Related party transactions: What should the Chief Ethics and Compliance Officer do?

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## Nursing Home Ownership/High-Level Personnel /Governing Body: Compliance Risks

- Fiduciary Relationship— “special obligation” to nursing home residents and their families
- Aiding and abetting breach of fiduciary duty
  - Breach of fiduciary duty
  - Knowledge of breach
  - Substantial assistance or encouragement by the aider and abettor in effecting that breach

Stetts v. Manor Care of Williamsport PA (North) et al., Pa. No. 16-0983 (C.P. Lycoming December 30, 2021)

- Chaim Charles Steg Case
  - History
  - Departmental Appeals Board Decision
  - **STAFFING FAILURES-criminal and civil consequences**

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## Federal Sentencing Guidelines §8B2.1

(a) To have an effective **compliance and ethics program**, for purposes of subsection (f) of §8C2.5 (Culpability Score) and subsection (b)(1) of §8D1.4 (Recommended Conditions of Probation — Organizations), an organization shall—

(1) exercise due diligence to prevent and detect criminal conduct;

and

(2) **otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.**

\*\*\*\*

(6)**The organization’s compliance and ethics program shall be promoted and enforced consistently throughout the organization through (A) appropriate incentives to perform in accordance with the compliance and ethics program; and (B) appropriate disciplinary measures for engaging in criminal conduct and for failing to take reasonable steps to prevent or detect criminal conduct.**

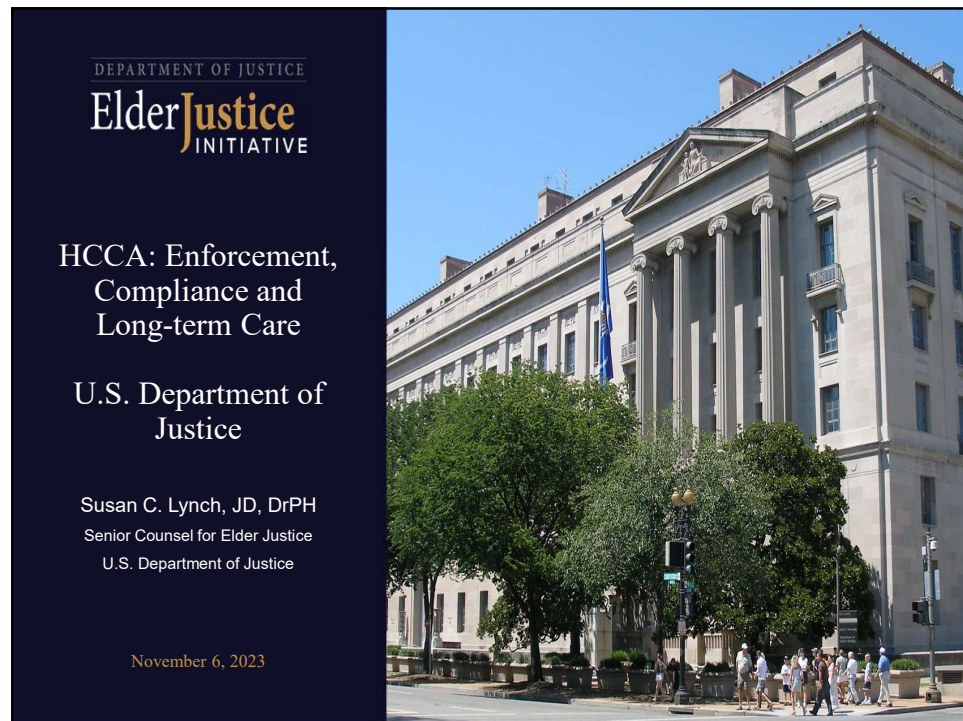
**How is the Compliance Department incentivizing performance?**

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## Health Care Fraud Investigations and Settlements

- Every health care fraud investigation should include an “effectiveness” review of the organization’s ethics and compliance program
- If the compliance program is not “effective”, high level personnel should be held personally accountable for this failure and subject to personal liability
- Settlements that could impact patient/resident safety (health care providers globally) should require monitoring by a third party regardless of whether patient harm demonstrated

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DEPARTMENT OF JUSTICE  
**Elder Justice**  
INITIATIVE

HCCA: Enforcement,  
Compliance and  
Long-term Care

U.S. Department of  
Justice

Susan C. Lynch, JD, DrPH  
Senior Counsel for Elder Justice  
U.S. Department of Justice

November 6, 2023

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## SUSAN C. LYNCH, JD, DRPH

Senior Counsel for Elder Justice, USDOJ

[Susan.Lynch@usdoj.gov](mailto:Susan.Lynch@usdoj.gov)

My comments are my own and do not necessarily reflect the Department of Justice's views

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## AGENDA

- DOJ National Nursing Home Initiative
  - **Nursing Home Cases: Civil, Criminal, Civil Rights**
- The Staffing Problem
- DOJ Collaboration with CMS, MFCUs, LTC Ombudsman
- Q & A

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## DOJ NATIONAL NURSING HOME INITIATIVE

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## DOJ NURSING HOME INITIATIVE WHO ARE WE? WHAT DO WE DO?

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### Who are we?

- Federal Prosecutors - Elder Justice Coordinators & Health Care Fraud Coordinators in 94 Federal Districts
- Collaboration with Medicaid Fraud Control Units
- Collaboration with LTC Ombudsman
- Collaboration with with APS, EMS, Law Enforcement, and others

### What do we do?

- Investigate and resolve civil, criminal, and civil rights matters nationwide
- Lead training and education re: nursing home quality and safety

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## DOJ FEDERAL CASES

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- Civil, Criminal, Civil Rights

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## PROBLEMS LEADING TO FEDERAL CASES: FACILITY PROBLEMS

- **Inadequate staff: number and skill level based on resident acuity**
- Inadequate supplies like food, diapers, gloves, and linens
- Terrible physical plant conditions, filthy, lack of air conditioning, lack of hot water, leaking roofs
- Overuse of antipsychotic medications
- Failure to supervise violent patients
- Choices driven by profit, not by care/clinical considerations
- Lack of ownership transparency and excessive related party management fees

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## PROBLEMS LEADING TO FEDERAL CASES: CHAIN PROBLEMS

- **Inadequate staff: number and skill level based on resident acuity**
- Financial considerations elevated over clinical.
- Lack of ownership transparency and excessive related party management fees
- Bonus structure that rewards practices leading to bad care (i.e., cutting staff, increasing census beyond capacity)
- Inadequate funds for training, supplies, care.
- Failure to investigate resident or family complaints.
- Inadequate or no use of internal quality data to track resident health status

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## PROBLEMS LEADING TO FEDERAL CIVIL & CRIMINAL CASES: BAD RESIDENT OUTCOMES

- Malnourished, dehydrated
- Pressure sores, scabies, or maggots
- Lying for hours/days in feces/urine
- Residents filthy, infected
- Wrong, too little or too much medication
- Falls, fractures, other injuries, deaths

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## FEDERAL PROSECUTION: CIVIL

- False Claims Act, 31 U.S.C. 3729
- Equitable Claims
  - Unjust enrichment
  - Payment by Mistake of Fact
- Corporations and Individuals



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## FALSE CLAIMS ACT

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Under the False Claims Act (FCA), any person who:

- Knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval; or
- Knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;
- conspires to commit either of the above;

is liable for treble damages and monetary penalties per false claim.

31 U.S.C. § 3729

## FEDERAL PROSECUTION: CRIMINAL

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### **US v. Houser (N.D. Ga.) No. 4:10-cr-00012**

- § 1349 conspiracy to commit § 1347 scheme to defraud
- 26 U.S.C. §§ 7202, 7203 tax violations

### **US v. Bell (W.D. Pa.) No. 02:4-cr-00212**

- § 1347 scheme to defraud
- § 1035 substantive counts – false medical records regarding patient care

### **US v. Wachter (E.D. Mo.) No. 4:05-cr-00667**

- § 371 conspiracy to violate §§ 1035/1347
- § 1035 substantive counts – representations of services not performed



## FEDERAL PROSECUTION: CIVIL RIGHTS

The Civil Rights of Institutionalized Persons Act (CRIPA), 42 U.S.C. § 1997a, gives the DOJ Civil Rights Division the authority to investigate abuse and neglect issues in publicly run facilities – such as nursing homes.

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## RECENT DOJ NURSING HOME CASES

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Department of Justice

Office of Public Affairs

FOR IMMEDIATE RELEASE

Wednesday, June 15, 2022

**Justice Department Sues American Health Foundation and Its Affiliates for Providing Grossly Substandard Nursing Home Services**

The Justice Department has filed a complaint under the False Claims Act against American Health Foundation (AHF), its affiliate AHF Management Corporation, and three affiliated nursing homes – Cheltenham Nursing & Rehabilitation Center (Cheltenham), The Sanctuary at Wilmington Place (Wilmington Place) and Samaritan Care Center and Villa (Samaritan) – for providing grossly substandard skilled nursing services between 2016 and 2018. AHF is a nonprofit corporation that is headquartered in Dublin, Ohio, and owns and controls nursing homes in Ohio, Pennsylvania and Iowa. Cheltenham is a 255-bed nursing home located in Philadelphia; Wilmington Place is a 63-bed nursing home located in Dayton, Ohio; and Samaritan is a 56-bed nursing home located in Medina, Ohio.

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**AMERICAN HEALTH FOUNDATION, INC. - ALLEGATIONS**

Government alleged that residents at 3 SNFs in a chain:

- did not receive adequate medical, dental or psychiatric treatment;
- Were not properly fed;
- were not cleaned or changed and were left to sit in their own urine;
- were overmedicated, and suffered from an abnormally high rate of pressure ulcers and falls
- Buildings were dirty, unsafe, pest-infected
- Infection control was lacking
- Two residents died, one hung himself and another pulled out her own breathing tube

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## MORE EXAMPLES OF “GROSSLY SUBSTANDARD CARE” ACCORDING TO THE COURT

“MF, the resident who suffered from **cognitive decline, weight loss, and stage 2 pressure ulcers**...[the facility] did not complete a change assessment, **include these issues in her care plan**, or inform her doctor or representative. *AHF*, 2023 WL 2743563, at \*8 (E.D. Penn. March 31, 2023).

“BB, who **complained that she felt like her bladder would burst** before she was taken to the bathroom..., that she was in **constant pain** because the facility did not acquire a prescription for pain medication from her doctor. [The facility **failed to** **update her care plan** with interventions of pain relief.” *Id.*

PRESS RELEASE

## New Jersey Man and Company Operating Nursing Homes and Assisted Living Facilities in Wisconsin Charged with Health Care Fraud

Thursday, February 2, 2023

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For Immediate Release

Office of Public Affairs

A federal grand jury in the Western District of Wisconsin returned an indictment yesterday charging Kevin Breslin, 56, of Hoboken, New Jersey, and KBWB Operations, LLC, doing business as Atrium Health and Senior Living (Atrium) in Park Ridge, New Jersey, with a scheme to defraud Medicare and Medicaid in connection with the delivery of or payment for health care benefits, items, or services.

PRESS RELEASE

## United States Files Complaint Against Bob Dean Jr. and Affiliated Corporate Entities for Financial Misconduct Stemming from Evacuation of Nursing Homes During Hurricane Ida

Thursday, January 12, 2023

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For Immediate Release  
Office of Public Affairs

The United States has filed a complaint under the National Housing Act of 1934 (NHA) against Bob Dean Jr. and several affiliated corporate entities for misappropriating and misusing the assets and income of four nursing homes in Louisiana before and after Hurricane Ida's landfall in August 2021. The four nursing homes, all of which were owned and operated by Dean and his companies, and had loans insured by the Federal Housing Administration (FHA), are Maison De Ville Nursing Home - Houma, Maison De Ville Nursing Home of Harvey, Maison Orleans Healthcare of New Orleans, and West Jefferson Health Care Center.

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### JUSTICE NEWS

Department of Justice  
Office of Public Affairs

FOR IMMEDIATE RELEASE

Monday, January 24, 2022

#### Owner of Health Care and Rehabilitation Facilities Indicted in \$38 Million Payroll Tax Scheme

A federal district court in Newark, New Jersey, unsealed an indictment today charging the owner of a network of health care and rehabilitation facilities with willfully failing to withhold and pay over employment taxes on behalf of his employees, tax evasion, and failing to file benefit plan reports.

According to the indictment, Joseph Schwartz, an insurance broker, failed to collect, truthfully account for, and pay over millions of dollars in payroll taxes owed to the IRS on behalf of his employees as required by law. Schwartz owned and operated the New Jersey-based Skyline Management Group LLC and several related companies (Skyline), which in turn owned and managed 95 health care and rehabilitation facilities operating in at least 11 states. Schwartz allegedly controlled the finances of Skyline and the related companies.

In approximately late 2016, Schwartz and an associate allegedly created several businesses to provide staffing and management services for approximately 15,000 employees of the Skyline-owned health care and rehabilitation facilities. Although the staffing companies were nominally owned by other individuals, Schwartz allegedly controlled their finances and operation. From mid-2017 through June 2018, Schwartz allegedly caused the staffing companies to not pay approximately \$38,982,016 in payroll taxes and unemployment taxes due the IRS. To evade unemployment taxes owed by the staffing companies, Schwartz allegedly used nominees to hide his control of the companies. He allegedly also provided, and directed others to provide, insufficient funds to pay the taxes owed.

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## ~~RESIDENTS SUFFER WHEN NURSING HOMES HAVE INSUFFICIENT STAFF – A FEDERAL CASE PERSPECTIVE~~

PRESS RELEASE

### Justice Department Finds State of New Jersey Violated U.S. Constitution with Deficient Care at Two State Run Veterans' Homes

Thursday, September 7, 2023

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For Immediate Release

Office of Public Affairs

The Justice Department announced today that it has concluded an investigation into whether New Jersey subjected residents of two veterans' homes to conditions that violate the 14th Amendment of the United States Constitution.

The department found reasonable cause to believe the residents of the New Jersey Veterans Memorial Homes at Menlo Park and Paramus face unreasonable harm and risk due to inadequate infection control practices and inadequate medical care, in violation of the U.S. Constitution. The New Jersey Department of Military and Veterans Affairs operates the homes, which provide long-term nursing care to veterans and their families.

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## ~~TREND: NOT ENOUGH STAFF IS AT THE HEART OF GROSSLY SUBSTANDARD CARE CASES~~

Three problems that we see in nursing home quality outcomes:

1. Staffing
2. Staffing
3. Staffing



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## **RESIDENTS SUFFER WHEN NURSING HOMES HAVE INSUFFICIENT STAFF – A FEDERAL CASE PERSPECTIVE**

JUSTICE NEWS

Department of Justice  
Office of Public Affairs

FOR IMMEDIATE RELEASE

Thursday, November 16, 2017

### **Mississippi Skilled Nursing Facility, Related Companies, and Executives Agree to Pay \$1.25 Million to Settle False Claims Act Allegations of Grossly Substandard Care to Facility Residents**

The Department of Justice announced today that Hyperion Foundation, a Georgia not-for-profit entity (Hyperion), Julie Mittleider, a resident of Georgia and Hyperion's former President, AltaCare Corporation, a Georgia corporation engaged in nursing home management (AltaCare), Douglas Mittleider, AltaCare's Chief Executive Officer, and related companies, Long Term Care Services Inc. and Sentry Healthcare Acquirors Inc., have agreed to pay the United States a total of \$1.25 million to resolve allegations of false claims to Medicare and the Mississippi Medicaid program for providing grossly substandard care to residents at the Oxford Health and Rehabilitation nursing home in Lumberton, Mississippi, from late 2005 through mid-2012, when it was operated by AltaCare, under a contract with Hyperion.

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## **RESIDENTS SUFFER WHEN NURSING HOMES HAVE INSUFFICIENT STAFF – A FEDERAL CASE PERSPECTIVE**

JUSTICE NEWS

Department of Justice  
Office of Public Affairs

FOR IMMEDIATE RELEASE

Friday, October 10, 2014

### **Extendicare Health Services Inc. Agrees to Pay \$38 Million to Settle False Claims Act Allegations Relating to the Provision of Substandard Nursing Care and Medically Unnecessary Rehabilitation Therapy**

**Company Also Required to Enter Five Year Chain-wide Corporate Integrity Agreement**

Extendicare Health Services Inc. (Extendicare) and its subsidiary Progressive Step Corporation (ProStep) have agreed to pay \$38 million to the United States and eight states to resolve allegations that Extendicare billed Medicare and Medicaid for materially substandard nursing services that were so deficient that they were effectively worthless and billed Medicare for medically unreasonable and unnecessary rehabilitation therapy services, the Justice Department and the U.S. Department of Health and Human Services Office of Inspector General (HHS-OIG) jointly announced today. This resolution is the largest failure of care settlement with a chain-wide skilled nursing facility in the department's history.

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## CORPORATE INTEGRITY AGREEMENT

- Can be chain-wide
- 5 years
- Quality Monitor

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## DOJ – CMS COLLABORATION

- Collaboration on referrals from the CMS “Locations”
- Coordination on use of remedies

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## DOJ – MFCU

### Cases:

- Collaboration on referrals
- Collaboration on Use of Quality Data
- Working cases together

### Training and Education:

- Nationwide meetings across the regions with DOJ Prosecutors, MFCU Directors, and state LTC Ombudsman

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## DOJ COLLABORATION WITH ELDER JUSTICE TEAMS

- 94 Elder Justice Coordinators and Teams
- DOJ, MFCU, LTC Ombudsman
- EMS
- Law Enforcement, APS
- Medical examiners
- Geriatric doctors and nurses

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## DOJ COLLABORATION WITH LTC OMBUDSMAN

- ❑ Trends at the facilities, national, regional, facility-level
- ❑ Training partners

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## DOJ RESOURCES FOR YOU IN YOUR LTC QUALITY WORK

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## ELDER JUSTICE WEBSITE



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## GET INVOLVED GET SAFE COMMUNITY OUTREACH FLYERS



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**QUESTIONS?**

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