# Injunctions and Third-Party Monitors

*By George Kawamoto*

Currently, government oversight of skilled nursing homes' compliance with state and federal statutes and regulations is spotty and haphazard. For this reason, the California Legislature expanded the provisions of Health and Safety Code section 1430(b) to allow current or former skilled nursing facility patients to bring private enforcement actions for violations of patient rights, and allow the court the discretion to issue an injunction which can be designed to prohibit future violations of important patient rights.

Injunctive relief is crucial to redressing claims against skilled nursing facilities brought under Health and Safety Code section 1430(b) for violations of residents' rights. That is particularly true in light of the recent Nevarrez decision that caps monetary relief under section 1430(b) at $500 per resident. Nevarrez v. San Marino Skilled Nursing and Wellness Centre, LLC (2013) 221 Cal. App.4th 102, 137 (Cal. App. 2d Dist. 2013), cert. denied, 2014 Cal. LEXIS 994 (Feb. 11, 2014).

A key factor to making injunctions effective and workable are thoughtful monitoring and compliance provisions.

## Third-Party Monitors Give Teeth to Injunctions

Injunctions obtained through understaffing class action cases have called for a third-party monitor to be appointed by the Court, tasked with obtaining and reviewing information, tracking defendant's compliance with the injunction, and making regular written reports to counsel of all parties.

In the understaffing context, for example, third-party monitors may rely on electronic and hardcopy documents pertaining to (a) the actual direct care nursing hours for each day pertaining to the relevant reporting period (e.g., electronic payroll data and labor reports); (b) the resident census for each day during the reporting period; (c) the NHPPD for each day during the reporting period; (d) the hire date, enrollment status and training commencement date for each nurse assistant who is not yet certified, if any, whose hours have been included in the NHPPD calculation during the reporting period; (e) the daily Nursing Staffing Assignment and Sign-In Sheets mandated by the California Department of Public Health's All Facility Letter dated January 31, 2011 for all direct care nursing hours claimed for a Director of Nurses, Assistant Director of Nurses, Director of Staff Development and any other personnel with primarily administrative and/or non-nursing titles or duties; (f) the actual dates, hours and assignments of all registry personnel providing direct nursing care and included in categories of "nursing services" as defined above; and (g) all statements of deficiencies and/or citations for staffing level violations and all AB 1629 nurse staffing audits issued by or received from the Department of Public Health.

Additional provisions allowing for surprise inspections and interviews of staff and residents further increase the monitor's ability to monitor compliance effectively. The defendant should willing to accept such provisions given that the monitor will in no manner substantially interfere with the delivery of care to residents, whether directly by his or her own actions or by demands upon staff.

## Third-Party Monitors Also Minimize Any Burden on Courts

Beyond giving teeth to injunctions, third-party monitors play another crucial role. They significantly minimize any burden on courts in monitoring and enforcing the injunction, thereby addressing any related concerns raised by defendants.

The use of a third-party monitor is well established as an appropriate procedure to include in an injunction order. See, e.g., Toussain v. McCarthy, 826 F.2d 901, 903 (9th Cir. 1987); Ruiz v. Estelle, 679 F.2d 1115, 1119 (5th Cir. 1982). Monitors have also been approved by several courts in a number of nurse understaffing class action lawsuits against skilled nursing facility chains. See, e.g., Lavender v. Skilled Healthcare Group Inc., et al., Humboldt County Superior Court, Case No. DR060264; Walsh v. Kindred Healthcare, Inc., et al., U.S. Dist. Ct., N.D. Cal., Case No. 3:11-CV-00050.

For the third-party monitor to be effective in reducing the burden on the court, it's important that the injunctive obligations imposed on the defendant are well-defined. For example, in the staffing context, the provisions contemplating how to calculate staffing compliance may explicitly reference the terms specified in the California Department of Public Health All Facilities Letter (AFL 11-19, issued on January 31, 2011). The injunction reporting and information exchange requirements should also be self-executing and clearly spelled out (e.g., specifying contemplated documents by title). The parties may also consider specifying opportunities for the defendant to cure a violation or agree to specific terms aimed at precluding the enforcement of de minimis violations, while at the same time ensuring that defendants are required to comply with the law.

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Finally, building in a process to allow the parties to attempt to resolve potential disputes or other compliance informally will also help in obtaining court approval. For example, the injunction may require the parties to first meet and confer and attempt to informally work out injunction compliance issues. Provisions may clearly provide for the plaintiff's right to enforce the injunction subsequently through a motion to compel or other appropriate procedure. The monitor's written reports to counsel should contain specific descriptions of violations sufficient to inform counsel in determining what follow-up is necessary.

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*Why We Need to Pass SB 1124..... (continued from page 1)*

of their rights regarding the transfer of their homes, (information is rarely sent in a language other than English), but also because they can rarely afford the $300/hour attorney fees required for adequate estate planning.

- This inequitable recovery system results in heirs and family members of deceased Medi-Cal beneficiaries in low-income communities having to sell their homes to pay off the estate recovery claim or sign a "voluntary lien" at **7% interest,** so that the state of California can collect on the estate when they die.

The cost of California's Medi-Cal recovery program far outweighs the benefits. Generations of families lose their family homes, simply because they did not know their rights or could not afford estate planning services. The reality is that California's recovery program contributes to creating a new generation of beneficiaries by forcing them to sell the family home or make monthly payments while charging usurious interest rates. Under the current system, Medi-Cal is hardly a benefit for anyone over 55 years of age. **It is a very expensive health care loan.**

We need to invest in the future for low-income Californians, and not continue to deny them the right to inherit the family home simply because their parents were not aware of their rights and were too poor to afford health care.

SB 1124 passed the Senate and is now in the Assembly. The challenge is to get the bill through Assembly Appropriations and to convince the Governor to sign it. Your Assembly Members need to hear from you and from your clients who have been caught up in the Recovery. Call, write or fax your Assembly Member today and tell them how important SB 1124 is to the future of California.