

IMPROVING THE QUALITY OF CARE IN NURSING HOMES: CLASS ACTION IMPACT LITIGATION

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Old age: the crown of life, our play's last act.

—Marcus Tullius Cicero¹

INTRODUCTION

Since 1900, the percentage of Americans sixty-five years or older has more than tripled.² Today, one in every eight Americans is part of the sixty-five-plus population. Estimates project that the elderly population in the United States will burgeon between the years 2010 and 2030 when the baby boom generation reaches age sixty-five. By 2030, there will be approximately seventy million older persons, more than twice their number in the year 2000. The elderly population will grow to twenty percent of the general population, equivalent to one in every five Americans.

Undoubtedly, as the elderly population rapidly increases, concerns over nursing home quality of care will draw significant attention. Presently, 1.6 million Americans receive care in nearly 17,000 nursing homes across the United States.³ The

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1. JOHN BARTLETT, BARTLETT'S FAMILIAR QUOTATIONS 88 (Justin Kaplan ed., 1992) (quoting MARCUS TULLIUS CICERO, DE SENECTUTE XXIII).

2. For all cited population statistics, see ADMIN. ON AGING, U.S. DEPT. OF HEALTH AND HUMAN SERV., A PROFILE OF OLDER AMERICANS: 2001 (2001), available at <http://www.aoa.gov/aoa/STATS/profile/2001/2001profile.pdf>.

3. See U.S. Dept. of Health and Human Serv., *HHS Fact Sheet: Programs and Initiatives for Aging America*, May 3, 2000, available at <http://www.hhs.gov/news/press/2000pres/20000503b.html>. "Nursing homes can be defined as 'privately operated establishments where maintenance and personal or nursing care

number of nursing home residents is bound to increase with the elderly population projections. In fact, the nursing home industry is expected to grow by four hundred percent in the next thirty years.⁴

These staggering population projections demonstrate a need for an increased awareness of nursing home issues. Undeniably, nursing home residents deserve quality care. The vulnerability of this segment of the population, due to such factors as mental and physical incapacity, loneliness, and financial hardship, further supports this obligation.⁵

Sadly, reality reflects quite a different story. Studies nationwide reveal that an alarming number of facilities provide insufficient care and services to their residents.⁶ In fact, according to a recent federal study, about ninety percent of the nation's nursing homes are staffed too thinly to provide such basic services as dressing, grooming, feeding, and cleaning.⁷ Seniors in poorly staffed homes are likely to suffer from blood-borne infections, dehydration, bedsores, malnutrition, and pneumonia.⁸

Not only are nursing home residents experiencing insufficient care, they are enduring abuses in their homes. Approximately forty percent of nursing home staff members admitted to engaging in psychological abuse of residents and nearly ten percent of nursing home staff members admitted to engaging in

are provided for aged or chronically ill persons who are unable to care for themselves properly." Susan J. Hemp, *The Right to a Remedy: When Should an Abused Nursing Home Resident Sue?*, 2 ELDER L.J. 195, 199 (1994) (quoting CHAIRMAN OF SUBCOMM. ON HEALTH AND LONG-TERM CARE, HOUSE SELECT COMM. ON AGING, 102D CONG., PROTECTING AMERICA'S ABUSED ELDERLY: THE NEED FOR CONGRESSIONAL ACTION 1 (Comm. Print 1991)).

4. See Heidi Boerstler & Scot W. Nolte, *Colorado Nursing Homes: Litigation and Public Policy Issues Concerning Abuse and Neglect*, COLO. LAW., Sept. 2000, at 93, 93.

5. See *Cappo v. Alliance Ins. Co.*, 499 So. 2d 233, 236 (La. Ct. App. 1986) (Sexton, J., noting "[e]lderly persons are a special class and thus persons chargeable for their care are held to a higher degree of care.").

6. See Angela Snellenberger Quin, Comment, *Imposing Federal Criminal Liability on Nursing Homes: A Way of Deterring Inadequate Health Care and Improving the Quality of Care Delivered?* 43 ST. LOUIS U. L.J. 653, 661 (1999) ("[A] shocking number of [nursing home] facilities do not provide good nursing care and services.").

7. Christopher Newton, *90% of Nursing Homes Providing Substandard Care—Federal Report*, SEATTLE TIMES, Feb. 20, 2002, at A1.

8. See *id.*

physical abuse of residents.⁹ In Colorado, for example, one nursing home class action¹⁰ spotlighted a shocking string of abuses of residents at the facility:

One resident developed urinary infections and severe bedsores that were left untreated for months. He ran a near-constant fever and lost almost all of his teeth. For several days, he was left without his feeding tube.

Another resident's heart stopped because neither his ventilator nor the attached alarm to notify staff was operating.

A female resident died of respiratory arrest when her tracheotomy tube was removed without her or her sister's consent.¹¹

This case provides a clear example of nursing home abuse. This particular nursing home, however, is but one of thousands nationwide cited for deficient care.

Numerous media exposés of the 1970s heightened awareness of nursing home deficiencies and violations.¹² These investigations brought public attention to the plights of nursing home residents. In subsequent years, state and federal governments responded by enacting legislation designed to increase the quality of care in nursing facilities.

Congress's major attempt to improve nursing homes was the enactment of the Omnibus Budget Reconciliation Act of 1987 (OBRA), which engineered almost all of the federal regulations and standards for nursing homes.¹³ A Colorado nursing home class action was one of the catalysts that prompted this

9. Karl Pillemer & David W. Moore, *Abuse of Patients in Nursing Homes: Findings from a Survey of Staff*, 29 GERONTOLOGIST 314, 317 (1989).

10. The O'Hara Regional Center for Rehabilitation in Denver, Colorado, closed its doors in late 2000, after involvement in multiple lawsuits alleging harm to nursing home residents. See Ann Imse, *A Question of Care; Denver Nursing Home Group Runs into Repeated Problems with Regulators*, ROCKY MTN. NEWS (Denver, Colo.), Nov. 3, 2001, at 8A.

11. See Sue Lindsay et al., *Facility to Pay \$30 Million; Costly Nursing Home Settles Suit Alleging Negligence, Abuse*, ROCKY MTN. NEWS (Denver, Colo.), Feb. 8, 2001, at 4A.

12. Hemp, *supra* note 3, at 195.

13. See Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, §§ 4211-4218, 101 Stat. 1330 (1987) (codified as amended in scattered sections of 42 U.S.C. §§ 1395-1396 (1994)).

legislation. In *Estate of Smith v. Heckler*,¹⁴ the plaintiff class sought to improve the deplorable incidents of inadequate care in many Colorado nursing homes.¹⁵ The Tenth Circuit Court of Appeals ultimately held that the Secretary of the Department of Health and Human Services had a duty to promulgate regulations that would ensure high quality medical care for nursing homes receiving federal aid.¹⁶ One scholar characterized this class action as a "landmark case" in its attempt to change federal nursing home regulations.¹⁷

Despite the enactment of OBRA, however, rigorous government regulations have not provided adequate checks on nursing home quality of care. In fact, government figures report that from July through September of 2000, nearly twenty-six percent of nursing homes were cited for violations.¹⁸ Resident advocates have proposed two important ways to fill the lingering voids left behind by regulation and improve the quality of care in nursing homes—comprehensive legislation and novel lawsuits.¹⁹ This Comment focuses upon the latter and advocates the use of innovative litigation as a tool of redress for aggrieved residents.

Traditional individual lawsuits have not incited the necessary impetus for change in the nursing home industry. Moreover, the typical nursing home resident is an unlikely individual claimant. An elderly, often frail and poor, resident is not likely to want to endure the burdens of a lawsuit. Nursing home residents would also not be eager to sue on their own because they often do not have the luxury of moving to another home and such a lawsuit would entail a direct challenge to their *present* caretakers. Furthermore, many attorneys hesitate to tackle a nursing home case as the damages from an individual resident's lawsuit are difficult to establish and may be quite nominal.

14. 747 F.2d 583 (10th Cir. 1984).

15. *Id.* at 585.

16. *See id.* at 591.

17. *See Hemp, supra* note 3, at 203.

18. Larry Margasak, *Panel: Nursing Home Abuses Not Treated Like Other Crimes*, ROCKY MTN. NEWS (Denver, Colo.), Mar. 4, 2002, at 26A.

19. *See* Christine V. Williams, Comment, *The Nursing Home Dilemma in America Today: The Suffering Must Be Recognized and Eradicated*, 41 SANTA CLARA L. REV. 867, 885 (2001).

Plaintiff creativity may help reverse this trend. Class actions have recently been utilized as a mechanism of expanded and inventive litigation. Class actions, a form of impact litigation,²⁰ help spotlight and drive attention to a particular cause because such lawsuits attract community attention and often advocate broad-based changes. In the nursing home context, this type of impact litigation will increase public awareness as to the immediacy of nursing home issues and thus jumpstart a sluggish legislature into action.

This Comment argues that class actions have the potential to improve the quality of care in nursing homes. Part I provides a background on nursing home regulation and suggests that these regulations fall short in providing quality care. Government surveys and sanctions are simply too lax and toothless. Additionally, the administrative burdens imposed by the regulations focus away from resident-oriented services.

Part II addresses why traditional individual lawsuits have not solved the problem. Although litigation may be a feasible solution because regulations have fallen short, individual lawsuits have not provided the necessary impetus to affect change in nursing homes. The proof of liability in individual suits is problematic, residents' physical and mental frailties present additional difficulties, and individual claims will unlikely lead to any significant, broad-based changes.

Part III focuses on the class action as an opportunity for residents to improve the quality of care in nursing homes. This part analyzes the class action process and details the requirements for class certification. Class actions have distinct advantages as compared to individual lawsuits. Conversely, however, important obstacles associated with class actions may preclude success in the nursing home context.

Part IV concludes that class actions have great potential for aggrieved residents. Class actions provide a means by which a class of residents and their advocates can make a significant improvement in nursing home quality of care. Additionally, Part IV recommends ways class action plaintiffs can overcome the obstacles to certification, including a proposal

20. Impact litigation has been described as "litigation oriented toward the change of institutional norms or practices, rather than the resolution of individual problems." Lucie E. White, *Mobilization on the Margins of the Lawsuit: Making Space for Clients to Speak*, 16 N.Y.U. REV. L. & SOC. CHANGE, 535, 535 n.1 (1987-88).

that residents avoid tort-based claims and instead employ alternative litigation theories.

This Comment surmises that regulations and traditional lawsuits have failed to improve the quality of care in nursing homes. Class actions may provide a unique route to a needed solution for aggrieved residents.

I. HOW REGULATION RELATES TO NURSING HOME QUALITY OF CARE

The nursing home industry is subjected to a multitude of regulations with regard to quality of care. These regulations are accomplished at both the federal and state level. Though the regulations aim to solve the problems nursing home residents face, the regulations have fallen short in this goal. This part details the regulatory framework affecting nursing homes and posits two important reasons why regulations have not improved the quality of care in nursing homes.

A. Federal Regulations

Federal regulation of the nursing home industry is accomplished chiefly through conditions that Congress imposes on nursing home facilities. Facilities must satisfy these regulations in order to receive funds under Medicare²¹ and Medicaid.²² In 1987, Congress enacted OBRA in an effort to curb nursing home abuse.²³ Congress sought to codify the existing federal authority applicable to nursing homes participating in the Medicaid and Medicare programs.²⁴ OBRA establishes: "(1) requirements for those providers participating in the federal

21. See 42 U.S.C. § 1395b(1) (1994) (providing federal financial assistance to states to reimburse certain costs of medical treatment provided to the elderly, including nursing home care).

22. See 42 U.S.C. § 1396b (1994) (detailing federal payouts to reimburse states that provide medical care, including nursing home care, to individuals whose income falls below specified amounts).

23. Pub. L. No. 100-203, 101 Stat. 1330 (1987). Congress enacted OBRA in response to recommendations made by the Committee on Nursing Home Regulation of the Institute of Medicine and the Government Accounting Office. See Sen. Charles Grassley, Essay, *The Resurrection of the Nursing Home Reform: A Historical Account of the Recent Revival of the Quality of Care Standards for Long-Term Care Facilities Established in the Omnibus Reconciliation Act of 1987*, 7 ELDER L.J. 267, 267 (1999).

24. See Williams, *supra* note 19, at 877.

health programs, (2) survey and certification processes to evaluate compliance with the participation requirements, and (3) stricter sanctions and enforcement procedures to address non-compliance with these requirements."²⁵ Additionally, OBRA directs states to protect the health, safety, welfare, and rights of nursing home residents by enacting laws or regulations consistent with federal standards.²⁶ OBRA's reforms led to increasingly rigorous and detailed government regulation with stricter federal oversight of the states.²⁷

An important provision of OBRA is the Nursing Home Reform Act (NHRA).²⁸ The NHRA governs nursing home operational standards.²⁹ This provision requires nursing homes that receive money from Medicare and Medicaid programs to maintain acceptable quality of care standards.³⁰ Under the NHRA, a nursing home must provide services and activities to attain or maintain the highest practicable physical, mental, and psycho-social well-being of each resident in accordance with a written plan of care.³¹ This written plan of care, usually entitled a "Resident's Bill of Rights,"³² ensures that all patients in the nursing home are receiving the same basic level of care.

As noted, OBRA governs the detailed survey process nursing homes continuously undergo in order to remain certified.³³ The survey process serves to ensure the quality of care of nursing homes. Nursing home surveys (either periodic or in response to a specific complaint) can lead to sanctions for facilities that do not maintain standards of quality as required under state or federal law.

25. *Id.* at 877-78 (quoting Grassley, *supra* note 23, at 267).

26. 42 U.S.C. § 1395i-3(f)(1) (1994).

27. See Eleanor D. Kinney, *Private Accreditation as a Substitute for Direct Government Regulation in Public Health Insurance Programs: When Is It Appropriate?*, LAW & CONTEMP. PROBS., Autumn 1994, at 48, 60-61.

28. 42 U.S.C. §§ 1395i-(3)(a)-(h), 1396r(a)-(h) (1994).

29. 42 U.S.C. § 1395i-3(c)-(h) (1994); 42 C.F.R. §§ 483.10-483.15 (1999). See generally Heath R. Oberloh, *A Call to Legislative Action: Protecting Our Elders from Abuse*, 45 S.D. L. REV. 655, 656-57 (2000).

30. 42 U.S.C. § 1396r(b) (1994); see also Boerstler & Nolte, *supra* note 4, at 94.

31. 42 U.S.C. § 1396r(b)(2) (1994).

32. See F. Robert Radel, II, *Nursing Home Litigation: An Overview of a Rapidly Evolving Area of Practice*, MEALEY'S LITIG. REP.: NURSING HOMES, Jan. 2001, at 2.

33. 42 U.S.C. § 1396r(g) (1994).

The standard survey usually involves a team of state inspectors who visit the facility and perform an on-site review of the care and services provided by the nursing home.³⁴ The review includes an investigation of the quality of care furnished, as measured by indicators of medical, nursing, and rehabilitative care, dietary and nutrition services, physical environment, and infection control.³⁵ If the inspectors determine that a nursing home has failed to meet any requirement or regulation, they can cite the home with a deficiency violation.³⁶ After a facility is cited with a violation, inspectors conduct an extended investigation within several months to determine if the facility has corrected the problem.³⁷ Surveys, which were designed to help enforce and maintain quality care in nursing homes, supply an important component of the OBRA legislation.

The NHRA also establishes Long-Term Ombudsman (LTO) programs (currently effective in all fifty states).³⁸ These quality-management programs recruit and train volunteers to investigate and resolve complaints made by or on behalf of residents of nursing facilities.³⁹ There are roughly 12,000 ombudsmen nation-wide, handling over 218,000 complaints per year.⁴⁰ In contrast to regulators, whose role is to apply laws and regulations, ombudsmen are supposed to help identify and investigate individual complaints coming from the residents of nursing facilities.⁴¹

Surveys and LTO programs are two important instruments of federal nursing home laws. While federal regulations dictate the guidepost standards, state regulations are designed to implement and enforce these standards within the individual fa-

34. See Quin, *supra* note 6, at 660.

35. *Id.*

36. *Id.* at 660–61 (quoting UNITED STATES GEN. ACCOUNTING OFFICE, CALIFORNIA NURSING HOMES: CARE PROBLEMS PERSIST DESPITE FEDERAL AND STATE OVERSIGHT, GAO/HEHS-98-202, at 6 (July 27, 1998) [hereinafter GAO REPORT], available at <http://www.gao.gov/archive/1998/he98202.pdf>). A deficiency is cited if the nursing home fails to comply with federal or state requirements. GAO REPORT, *supra*, at 7.

37. See Quin, *supra* note 6, at 660–61.

38. See *An Evaluation of the Long-Term Care Ombudsman Programs of the Older Americans Act*, at <http://www.nap.edu/readingroom/books/rprp/summary.html> [hereinafter *Evaluation of Ombudsman Programs*] (last visited Dec. 22, 2000).

39. See *id.*

40. Oberloh, *supra* note 29, at 657.

41. See *An Evaluation of Ombudsman Programs*, *supra* note 38.

cilities. OBRA mandates strict federal oversight of the states. The federal government imposes OBRA obligations upon the states as a condition of receiving federal dollars (in the form of Medicare and Medicaid payments).⁴² As a result, all fifty states have enacted regulations to ensure compliance with federal standards.

B. State Regulations

Although the federal structure retains a supervisory role, state regulations function independently of the federal regulations. The United States Department of Health and Human Services is responsible for the surveillance of state regulations. The HHS publishes rules to guide states and facilities to enact their own laws or regulations consistent with the federal rules.⁴³ Most states, however, have adopted the majority of the federal standards set forth under OBRA.⁴⁴

As noted above, enforcement of nursing home regulations occurs through regular surveys.⁴⁵ A nursing home's failure to meet the requisite standards can result in the imposition of fines, sanctions, and a possible threat of de-certification.⁴⁶

Additionally, state statutes generally list definitions of abuse and neglect as well as outline the various rights afforded to nursing home residents.⁴⁷ Every nursing home is required to have an internal grievance procedure for residents and their representatives that allows them to voice concerns regarding violations of these rights.⁴⁸ Furthermore, some states offer

42. See *Gray Panthers Advoc. Comm. v. Sullivan*, 936 F.2d 1284, 1286 (D.C. Cir. 1991).

43. Hemp, *supra* note 3, at 204–05 (citing Toby Edelman, *The Nursing Home Reform Law: The Federal Response*, 27 CLEARINGHOUSE REV. 454, 454 (1993)).

44. See Radel, *supra* note 32, at 2.

45. Marshall B. Kapp, *Quality of Care and Quality of Life in Nursing Facilities: What's Regulation Got To Do With It?*, 31 MCGEORGE L. REV. 707, 710 (2000).

46. *Id.* at 711.

47. Radel, *supra* note 32, at 2.

48. See Margaret M. Flint, *Nursing Homes*, in BASIC ELDER LAW, at 559, 584 (PLI Tax Law & Estate Planning Course, Handbook Series No. 266, 1998); see also COLO. REV. STAT. § 25-1-120(3)(d)–(e) (2001); *MacLeod v. Miller*, 612 P.2d 1158 (Colo. Ct. App. 1980) (stating that grievance procedures in nursing homes permit a resident to formally complain about any conditions, treatment, or violations of rights).

nursing home residents a statutory private right of action to safeguard these rights.⁴⁹

C. Regulations Fall Short

Despite this regulatory infrastructure, nursing home residents still face substandard care. The United States General Accounting Office (GAO) reported to the Congressional Special Committee on Aging in July 1998 that the federal and state oversight infrastructure fails to secure adequate care in nursing homes across the country.⁵⁰ Nursing home residents continue to suffer from substandard care and experience abuse, neglect, and mistreatment.⁵¹ Surveys and citations are not providing solutions. One study revealed that approximately forty percent of nursing homes have violated federal standards on more than one occasion.⁵² Despite these violations, however, studies continue to show that the problems are often not corrected and deficiencies may continue.⁵³ The top five nationwide repeat deficiencies include: (1) not storing, preparing, and delivering food in a sanitary manner; (2) not ensuring an accident-free environment; (3) not providing services to maintain residents' well-being; (4) not using patient assessments to develop a plan of care; and (5) not conducting comprehensive resident assessments.⁵⁴

49. See discussion *infra* Part IV.

50. See GAO REPORT, *supra* note 36. Although this report focused on nursing homes in California, the problems identified were determined to be indicative of a nationwide concern. Quin, *supra* note 6, at 663 n.94 (citing GAO REPORT, *supra* note 36).

51. Quin, *supra* note 6, at 664 (citing Health and Human Services Department, Health Care Administration Fact Sheet, *Assuring the Quality of Nursing Home Care* (July 21, 1998), at <http://www.hhs.gov>).

52. Clifford E. Cardone, *Battling Nursing Home Neglect: Finding the Right Legal Pieces*, 44 LA. B.J. 508, 509 (1997) (citing *Nursing Homes: When a Loved One Needs Care*, 60 CONSUMER REP. 518, 518 (1995)).

53. Quin, *supra* note 6, at 663 ("Many of the problems that affect the safety and health of nursing home residents . . . went undetected by the state surveyors, and even if the state surveyors identified the deficiencies, they went unpunished.").

54. Marsha Austin & Allison Sherry, *Nursing-Home Citations Soar*, DENV. POST, Feb. 24, 2001, at 1A. Repeat deficiencies also differ by state. In Colorado, for example, the two top repeat deficiencies are: (1) not providing adequate house-keeping and maintenance; and (2) not preventing or treating pressure and bed sores. *Id.*

Why the repeated deficiencies? Why have nursing home regulations failed to provide adequate care for residents? Two key reasons answer these questions—a slack approach to sanctions and a missing patient-focus.

First, the penalties imposed by federal and state regulations are insufficient and have not proven to be adequate incentives for nursing homes to change or improve their standards. An expert in nursing home litigation underscored the failure of nursing home regulations to provide quality care for residents:

[S]tate safety nets have such gargantuan holes that it takes private suits to improve the quality of care for the elderly The only deterrent to bad care is regulation and unfortunately the regulation is toothless.⁵⁵

The Health Care Financing Administration (HCFA) seldom imposes any bona fide sanctions for nursing home violations.⁵⁶ Nursing homes are often cited but not required to pay the fines.⁵⁷ Moreover, the grace periods allowed for violations of the regulations allow nursing homes to continue to operate, even though they are not in compliance with the federal regulations.⁵⁸ Thus, the sanctions are toothless. As noted by one commentator:

The lax approach taken by HCFA in enforcing the regulations and imposing sanctions has left nursing home owners, administrators and operators with little motivation to comply with the regulations or provide residents with the necessary and required quality of care.⁵⁹

The second reason why regulations are inadequate is that the administrative tasks needed for compliance with the regu-

55. See Allison Sherry, *Suits Spotlight Nursing Home Abuse*, DENV. POST, Feb. 9, 2001, at 1B (quoting David Marks, a Houston lawyer specializing in nursing home litigation).

56. See Quin, *supra* note 6, at 668 (citing to the GAO REPORT, *supra* note 36, at 23).

57. See, e.g., Boerstler & Nolte, *supra* note 4, at 93 (noting that regulators rarely assess fines in Colorado).

58. See Quin, *supra* note 6, at 668 (citing to the GAO REPORT, *supra* note 36, at 24–26).

59. *Id.* at 669.

lations take time away from direct patient care activities.⁶⁰ In the words of John A. Nyman, of the Institute for Health Services Research at the University of Minnesota:

Some regulations may be necessary in all states. But unnecessary regulation results in waste and inefficiency. It prohibits managers from responding fully to changes in price. It redirects managers from serving customers to serving regulators. It inhibits innovation. It substitutes the monolithic preferences of the state for the diverse preferences of individual patients and their families.⁶¹

There is little incentive for staff members to develop strong loyalties for their patients when the priority rests instead with satisfying governmental regulations. These relationships, however, are critical to providing a quality environment. After all, nursing homes are, in fact, *homes* to these aggrieved residents.

Regulations have failed to adequately secure nursing home residents with quality care. Indeed, "[r]egulatory requirements may be essential to inspire, but can never substitute for . . . protecting and promoting the well-being of our most vulnerable citizens."⁶² Fortunately, nursing home residents faced with substandard care are not completely defenseless due to inadequate regulations. Residents should consider alternative means of recourse. Litigation provides one course of action that may enable residents and their advocates to lengthen strides towards improving the system. Part II addresses the potential of litigation in this capacity, with particular emphasis on the shortcomings of traditional, individual lawsuits.

II. INDIVIDUAL LAWSUITS HAVE NOT SOLVED THE PROBLEM OF SUBSTANDARD CARE IN NURSING HOMES

Because regulations have failed to improve the quality of care in nursing homes, residents should take advantage of liti-

60. Kapp, *supra* note 45, at 720 (noting that some regulation implementation methods divert energies away from patient care).

61. John A. Nyman, *Letters: Federal Nursing Home Regulation*, 15 HEALTH AFFAIRS 317, 317-18 (1996).

62. Kapp, *supra* note 45, at 731 (citing Elias Cohen, *Legal Obligations/Moral Obligations: Elusive Cross Connections in Long Term Care*, 5 CONTEMP. GERONTOLOGY 39 (1998)).

gation opportunities. Traditional individual lawsuits, however, have not sufficiently deterred substandard care in the facilities.⁶³ The shortcomings of individual claims are understandable in the nursing home context.

First, in individual nursing home suits, the proof of liability presents difficulties. Traditional claims are often based on standard negligence or medical malpractice.⁶⁴ Accordingly, "[a]lthough the standard of liability for negligence seems relatively straightforward, a peculiar problem confronts the plaintiff in a nursing home case—the plaintiff must be able to measure his injury in monetary terms."⁶⁵ Traditional damage awards are based on future or lost earnings, emotional distress, medical expenses, loss of physical well-being, and life expectancy. Damages measured by these standards are problematic for elderly residents who have no present earnings and limited life expectancy.⁶⁶ Moreover, the limited amount of potential recovery restricts the availability of legal counsel to advocate on behalf of these residents.⁶⁷

Second, nursing home residents are unlikely individual claimants due to physical and mental frailties. The majority of residents are elderly, ill, disabled, alone, or poor.⁶⁸ Therefore, it is improbable that these residents would undertake the time commitment and financial burden of a lawsuit.

Lastly, individual claims brought by nursing home residents will not likely lead to any sort of industry-wide change. While individuals may find compensation, there is no assurance that personal claims will substantially affect or improve the quality-of-life standards and inadequacies that plague the nursing home industry. Instead, what is needed is impact liti-

63. See David S. Douglas et al., *Rx for the Elderly: Legal Rights (And Wrongs) Within the Health Care System*, 20 HARV. C.R.-C.L. L. REV. 425, 468 (1985).

64. See Radel, *supra* note 32, at 1.

65. Douglas et al., *supra* note 63, at 469.

66. Class actions may also circumvent the traditional need for proof of damages if based on other theories. See discussion *infra* Part IV.

67. Quin, *supra* note 6, at 677 (citing Jeffrey Spitzer-Resnick & Maya Krcinovic, *Protecting the Rights of Nursing Home Residents: How Tort Liability Interacts with Statutory Protections*, 19 NOVA L. REV. 629, 645 ("[M]any attorneys are reluctant to take on any personal injury cases for elderly individuals due to the perceived inability to collect significant damages even if liability is readily apparent.")).

68. *Id.* at 678.

gation.⁶⁹ Impact litigation will help attract public attention to a particular issue and promote widespread change because such litigation advocates broad-based goals and changes.

Impact litigation is particularly important and relevant in the nursing home context. Recent legislative efforts attempting to improve the quality of care in nursing homes have simply fallen short. The problem stems from the fact that the citizenry is uninformed as to the dire realities in a significant number of nursing homes. This is ironic, in a sense, given the projected population boom and the fact that most Americans will someday confront these issues themselves. Public attention is needed in order to make nursing home improvement a fundamental goal for legislators in this country. Nursing home class actions will ignite awareness of the poor quality of life in these facilities and hopefully jumpstart legislators toward bolder and more effective changes in the industry.

Impact litigation, in the form of class actions, will fill in the gaps left by regulations because these lawsuits will bring nursing home issues into the headlines. Conversely, however, impact litigation is not without its burdens. This is especially true with class actions. Even though class actions have increased potential in promoting change and public awareness, significant obstacles must be overcome before a class can proceed with a lawsuit. The next part addresses the procedural requirements for class actions, as well as the advantages and disadvantages of these lawsuits.

III. PAVING THE WAY: CLASS ACTION LITIGATION

The class action, one type of impact litigation, offers nursing home residents a creative alternative means of improving the quality of care in nursing homes. In a class action, a group of claimants sues one or more defendants through a representative plaintiff. All members of the class benefit or suffer losses from the outcome in the same way.⁷⁰ The beginning phase of class action litigation includes class certification. Federal Rule of Civil Procedure 23 sets the guidelines and es-

69. For a discussion of impact litigation, see generally White, *supra* note 20, at 535.

70. FED. R. CIV. P. 23(c)(3) advisory committee's note.

tablishes the prerequisites for class action certification.⁷¹ State rules of procedure are generally similar to the federal rule.⁷²

A. Rule 23 Requirements for Class Certification

Subdivisions (a) and (b) of Rule 23 enumerate the criteria that must be met for a class to be certified.⁷³ The Rule 23(a) prerequisites include numerosity, commonality, typicality, and adequate representation.⁷⁴ The numerosity requirement states that the number of class action plaintiffs must be so numerous that joinder would be impracticable;⁷⁵ however, no absolute numerical guidelines exist.⁷⁶ Commonality requires that there be a single common question of law affecting all plaintiffs.⁷⁷ A related criteria is the typicality requirement—that each plaintiff's claim arises from the same event or practice that gives rise to the other claims.⁷⁸ Lastly, the class representative must have suffered the same injury as other members of the class in order to sufficiently protect the class interests.⁷⁹ Once the class satisfies these four prerequisites, the certification inquiry continues.

In addition to meeting the requirements of Rule 23(a), classes seeking certification must also fit within one of the categories of Rule 23(b).⁸⁰ Rule 23(b)(1) covers cases in which separate actions by or against individual class members would risk establishing “incompatible standards of conduct for the party opposing the class,”⁸¹ or would be dispositive of the interests of nonparty class members or impair these non-members’

71. FED. R. CIV. P. 23 (detailing the prerequisites to a class action).

72. See, e.g., COLO. R. CIV. P. 23 (detailing the prerequisites to a class action).

73. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 591 (1997).

74. FED. R. CIV. P. 23.

75. FED. R. CIV. P. 23(a)(1); see also *Amchem Prods., Inc.*, 521 U.S. at 613; *Daigle v. Shell Oil Co.*, 133 F.R.D. 600, 603 (D. Colo. 1990) (“In determining whether joinder is impractical, the court looks at the size of the proposed class, the geographic dispersion of its members, and whether the members’ names are easily ascertainable.”).

76. See *Gen. Tel. Co. of the Northwest v. Equal Employment Opportunity Comm’n*, 446 U.S. 318, 330 (1980).

77. FED. R. CIV. P. 23(a)(2); see also *Amchem Prods., Inc.*, 521 U.S. at 613; *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank*, 55 F.3d 768, 817 (3d Cir. 1995).

78. FED. R. CIV. P. 23(a)(3); see also *Amchem Prods., Inc.*, 521 U.S. at 613.

79. FED. R. CIV. P. 23(a)(4); see also *Amchem Prods., Inc.*, 521 U.S. at 613.

80. See *Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970, 974 (5th Cir. 2000).

81. FED. R. CIV. P. 23(b)(1)(A).

abilities to protect their interests.⁸² This category is used when adjudication of individual claims may yield varying results and thus a class action is necessary. This is often the case where a defendant risks possible or probable insolvency. These "limited fund" cases are more apt for certification because of the likelihood that separate actions by class members would drain the defendant of assets before other members of the class could receive full payment for their injuries.⁸³ Class actions are appropriate for these types of situations in order to ensure that all class members' interests are protected.

Rule 23(b)(2) governs actions for declaratory and injunctive relief. The court may certify a class under Rule 23(b)(2) if "[t]he party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."⁸⁴ If the primary relief sought is injunctive or declaratory, certification can be deemed appropriate under this provision. Monetary relief, however, may still be obtained in a Rule 23(b)(2) class action as long as the *dominant* relief sought is injunctive or declaratory.⁸⁵

Rule 23(b)(3) allows class actions when there are questions of law or fact common to members of the class and these predominate over any questions affecting only individual members.⁸⁶ This category applies when a class action is superior to other available methods for the fair and efficient adjudication of the controversy.⁸⁷

Courts adhere to all of these Rule 23 prerequisites very strictly and will not certify a class if the prerequisites are not met.⁸⁸ Certification occurs in the early stages of a lawsuit, and the benefits of impact litigation (i.e., spurring public awareness as to the plights of nursing home residents) will not accrue if certification is denied. Therefore, nursing home residents and their attorneys must evaluate the class's chances of successful

82. FED. R. CIV. P. 23(b)(1)(B).

83. See *In re Asbestos*, 90 F.3d 963, 982 (5th Cir. 1996).

84. FED. R. CIV. P. 23(b)(2); see also *Bolin*, 231 F.3d at 975.

85. See *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 411 (5th Cir. 1998).

86. FED. R. CIV. P. 23(b)(3).

87. See *id.*

88. See *General Tel. Co. of S.W. v. Falcon*, 457 U.S. 147, 161 (1982).

certification prior to bringing suit.⁸⁹ Before addressing this issue, however, it is important to recognize the benefits of class action litigation and why such a lawsuit would be worthwhile.

B. The Advantages of Class Actions as Opposed to Individual Lawsuits

If certification is feasible, class actions have greater potential to improve the quality of care in nursing homes compared to individual lawsuits. Where individual suits fall short in the nursing home context, class actions promise valuable gains. There are specific advantages that class actions have over individual claims. Some of the reasons alluded to above⁹⁰ as to why individual lawsuits did not solve the problem are also applicable in this analysis of the advantages of class actions.⁹¹ One particular advantage of class actions is that class members do not face the hampering potentialities of one member's physical and mental frailties, which may end an individual suit. Moreover, nursing home residents may want to participate in a class action because they fear retaliation by their caretakers. Additionally, the chances for success increase in a class action context. Lastly, class actions promote public awareness as to the plight of nursing home residents.

1. Hesitant Individual Claimants Are More Likely to Be Class Members

The potential awards and consequences of class actions may help influence a resident who ordinarily would not sue to take advantage of this means to improved care.⁹² In the nursing home context, claimants may be reluctant to file individual actions because they are physically or mentally unable to do so or because they fear the repercussions of an individual lawsuit.

89. Section C of this Part proposes ways in which class action plaintiffs might overcome this certification hurdle.

90. See discussion *supra* Part II.

91. Particularly, the problems posed by individual suits referring to nursing home residents as unlikely claimants because of physical and mental frailties can also be offered as advantages for pursuing the claim as a class action.

92. *Accord* Arkansas Educ. Ass'n. v. Board of Educ., 446 F.2d 763, 765 (8th Cir. 1971) (class action is allowed because of class members' fear or reluctance to bring separate actions).

Nursing home residents may be hesitant to sue because of their mental and physical health incapacities.⁹³ This specific concern was recognized in *Brown v. Giulliani*.⁹⁴ Here, nursing home residents brought a class action alleging an unlawful transfer of residents.⁹⁵ In analyzing class certification, the court noted:

In this case, the plaintiffs and proposed class members are frail, elderly and disabled individuals who could not effectively bring separate actions on their own behalf. In fact, because of their age and health it is possible that [they] might not survive until this action . . . is completed.

...

Were individual plaintiffs, through frailty, ill-health or otherwise, unable to prosecute the action, additional qualifying individual plaintiffs might have to be identified, and suit would have to be re-filed on their behalf, such re-filing engendering further delays, inconvenience, inefficiency and potential problems⁹⁶

Not only are nursing home residents hampered by physical health, but these claimants may also hesitate pursuing litigation on their own out of trepidation. Class actions are often composed of members who do not have the daring to pursue individual actions.⁹⁷ This is surely the case in the nursing home setting. Many residents are immobile and must pursue litigation against their nursing homes while still in that same nursing home. It is logical that they would fear challenging their caretakers while still under the care of those very caretakers. One commentator noted that "[r]esidents rarely bring actions to enforce standards governing the quality of care in their nursing homes. The residents are fearful of voicing their com-

93. See *supra* Part II.

94. 2000 U.S. Dist. LEXIS 8889 (S.D.N.Y. 2000).

95. Nursing home residents brought a class action, claiming that an alleged emergency evacuation and subsequent closure of their nursing home based on alleged structural defects was unlawful because of insufficient evidence of structural damage. See *id.* at *1-3.

96. *Id.* at *24-25.

97. *Accord Arkansas Educ. Ass'n.*, 446 F.2d at 765 (certifying class action because of members' "natural fear or reluctance" to bring separate actions); see also *supra* Part II.

plaints against the facilities that provide them with assistance in daily living."⁹⁸ Nursing home residents do not have the luxury of simply getting up and changing locales. One must not forget the vulnerable and often immobile states of these residents. Their fears of taking action against their nursing homes are understandable.

2. Class Actions Have Improved Chances of Success by Aggregating Claims and Allowing More Individuals Access to the Courts

The chances of success increase with class actions as compared to individual lawsuits.⁹⁹ Class actions will more likely lead to a determination of liability.¹⁰⁰ Because a class action pools claims into one case, it substantiates the validity of the individual claims and, in effect, the likelihood of a successful outcome and determination of liability.¹⁰¹ Additionally, class actions envision success for nursing home residents on a personal level. The class action provides more individuals with access to the courts.¹⁰² Class actions grant access for individuals with claims too small to justify the expense of litigation.¹⁰³ Nursing home residents who may have little prospect of success in pursuing an individual claim (due to their own hesitations or frailties) may fare much better in a class action setting.

The improved potential of success from aggregation of claims and increased access for more individuals yields an additional benefit of deterrence.¹⁰⁴ Nursing home operators have much more to lose with the impending threat of class action litigation.

98. Douglas et al., *supra* note 63, at 468 (quoting Mary M. Tonkin, Comment, *Life-Care Contracts and the Missouri Omnibus Nursing Home Act: The Need for Amended Legislation*, 24 ST. LOUIS U. L.J. 739, 745 (1981)).

99. See *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) (noting that class actions result in significantly higher damage awards); *Johnson v. W. Suburban Bank*, 225 F.3d 366, 372 (3d Cir. 2000) (plaintiff argued that the prospect of a class action award will deter violations more effectively than the prospect of individual actions).

100. See *Castano*, 84 F.3d at 746 (noting that aggregation of claims makes it more likely a defendant will be found liable).

101. See *id.*

102. *Developments in the Law—The Paths of Civil Litigation*, 113 HARV. L. REV. 1752, 1806 (2000).

103. See *id.* at 1809.

104. See *id.* at 1809–10.

Potential defendants know that they will be held accountable for such harm in both monetary and reputational terms, and they therefore have a greater incentive to avoid engaging in harmful activities. This deterrence function of the class action ultimately benefits consumers and courts alike, as greater deterrence leads to fewer future injuries and fewer future lawsuits.¹⁰⁵

Not only will residents be able to aggregate their claims and thus better secure a determination of liability, but also more residents will have access to the courts as members of a class, rather than as individuals.

3. Class Actions Promote Public Awareness

Class actions will also help promote increased awareness as to the quality of care in nursing homes. This brand of impact litigation will bring nursing home issues into the spotlight more assuredly than individual lawsuits. Class actions attract media and industry attention, while individual claims often go unnoticed.¹⁰⁶ This attention and focus alerts the public as to the realities in the homes. In turn, a concerned citizenry increases the pressure on legislators to enact more effective protections for residents. Without a concerned public attitude, nursing home issues are always going to be placed on the backburner. One of the valuable consequences of shocking the public as to the realities in nursing homes is that it will enhance the general consciousness. Class actions, in spotlighting the abuses and drawing media attention, will help do just that.

Thus, class actions have distinct advantages compared to individual lawsuits. Reluctant residents, whether due to frailties or a sense of anxiety, may instead favor class membership. Class actions improve the overall chances of success as well as the likelihood that an attorney will accept representation.

105. See *id.* at 1810.

106. For example, the Colorado *O'Hara* class action, explained *supra* note 10, generated a great deal of publicity. See, e.g., Anne Imse, *A Question of Care: Denver Nursing Home Group Runs into Repeated Problems with Regulators*, ROCKY MTN. NEWS (Denver, Colo.), Nov. 3, 2001, at 8A; James B. Meadow, *Answering the Howls of Injustice: Activist, Ex-Nun Battle Goliaths to Win Legal Rights for Downtrodden*, ROCKY MTN. NEWS (Denver, Colo.), Feb. 25, 2001, at 5A; Stuart Steers, *Old-Age Wisdom: The State Told Virginia Fraiser to Shut Up, But She Won't Give Up on the Elderly*, DENV. WESTWORD, July 19, 2001, at 17, available at <http://www.westword.com/issues/2001-07-19/feature2.html/1/index.html>.

Moreover, class actions spur increased public awareness, which is necessary for any substantial improvement of care in nursing homes.

Despite these advantages, however, difficulties can arise. Indeed, class actions have some shortcomings and these may prove particularly problematic in the nursing home context.

C. Obstacles for Nursing Home Class Actions

Nursing home residents may have some hurdles to overcome for their class actions to prove successful. Although class actions have distinct advantages as compared to individual suits, certification may prove problematic in nursing home litigation, as noted above.¹⁰⁷ Tort-based claims, regulations, and statutory limitations on damages may hinder the class certification process. Residents will lose their chances of recourse if a court refuses to certify the class. Thus, it is important to recognize these obstacles with nursing home class actions.

1. Tort-Based Claims

Certification may prove problematic if nursing home residents pursue tort-based claims. Plaintiffs usually sue nursing homes based on tort theories, often premised on personal injuries resulting from a single instance (for example, a slip and fall injury). These suits allege a violation of a duty of care owed to the resident and that a subsequent injury occurred as a result of this breach. Class actions, however, will not likely succeed based on such tort claims. The "injury" requisite for these claims is often too individualized among class members to satisfy the commonality element of class action certification. This obstacle was a strong determinant in the outcome in *Blum v. Yaretsky*.¹⁰⁸

In *Blum*, Medicaid residents in a nursing home brought a class action challenging the home's decision to discharge them or transfer them to a lower-level facility without notice.¹⁰⁹ The United States Supreme Court, in analyzing Article III jurisdiction under the Constitution, determined that each member of

107. See discussion *supra* Part III.A.

108. 457 U.S. 991 (1982).

109. *Id.* at 993.

the class must show that he personally had been injured and the complaining party must show he was within the class that was concretely affected.¹¹⁰ This case illustrates potential difficulties that class action plaintiffs may encounter in tort-based litigation pursuits. Cases predicated on individual injuries may prove problematic because they fail to satisfy the typicality and commonality requirements of Rule 23.¹¹¹

Additionally, tort-based claims may not succeed as class actions because the requisite causation element of any tort action may be difficult to prove. There may be wide-ranging differences in the causes of injuries among potential class members.¹¹² Moreover, causation may prove problematic because residents' physical frailties make it difficult to separate the expected effects of aging from certain injuries.¹¹³ Accordingly, nursing home residents seeking to pursue a class action should try to establish a common claim with proof of more general claims of substandard care and practices violative of residents' basic rights, rather than solely tort-based claims.¹¹⁴

110. *Id.* at 999-1000.

111. Asbestos litigation provides a helpful analogy to illustrate this obstacle regarding tort-based claims. The United States Supreme Court, along with other courts hearing asbestos class actions, have previously determined that the individual characteristics of the plaintiffs outweighed the general claim based on the harmfulness of asbestos. See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) (holding class did not satisfy the requirements of Rule 23 as to common-issue predominance or adequacy of representation); see also *Hurd v. Monsanto Co.*, 164 F.R.D. 234, 240 (S.D. Ind. 1995) (noting that class should not be certified where questions of exposure and injury exist); *Davenport by Fowlkes v. Gerber Prods. Co.*, 125 F.R.D. 116, 120 (E.D. Pa. 1989) (holding that certification would not advance the litigation because all of the issues related to liability would remain unresolved on an individual basis). In these asbestos cases, certification was denied because of a failure to satisfy the commonality and typicality requirements of Rule 23. These class action claimants each suffered different types of injuries due to different exposures by different kinds of products. Thus, each plaintiff's claim was unique due to different types and lengths of exposure as well as different asbestos products. See, e.g., *Amchem Prods., Inc.*, 521 U.S. at 603 (noting that plaintiffs suffered different types of injuries caused by asbestos-exposure, including "mesothelioma, lung cancer, certain 'other cancers' (colon-rectal, laryngeal, esophageal, and stomach cancer), and 'non-malignant conditions' (asbestosis and bilateral pleural thickening).").

112. See, e.g., *Kohn v. Am. Hous. Found.*, 178 F.R.D. 536 (D. Colo. 1998) (denying class certification because of plaintiffs' highly individualized injuries).

113. *Hemp*, *supra* note 3, at 213.

114. See discussion *infra* Part IV for an analysis of claims that would fit this characterization.

2. Regulations May Impede Class Certification

Federal and state regulations may also prove detrimental to nursing home class action certification.¹¹⁵ Federal regulations require Medicare recipients to exhaust their administrative remedies before instituting a legal action.¹¹⁶ If residents do not exhaust these remedies the court does not have jurisdiction to hear the case. Without jurisdiction, of course, a court will not certify a class action. Thus the class action will be stopped in its tracks. This is a concern in the nursing home context because all members of a class action may need to exhaust administrative remedies before consideration of a lawsuit.

It is important to note, however, that in order for the Medicare exhaustion requirements to apply, a claim must arise under the Medicare Act.¹¹⁷ Cases that have analyzed the exhaustion requirements usually involve requests for reimbursement of benefits or other claims relating to benefits or expenses.¹¹⁸ Thus, if class action plaintiffs do not present such a claim requesting payment of benefits or reimbursement for a denied coverage under either the Medicare or Medicaid Acts, the potential obstacle of exhausting administrative remedies should not hinder their claims. Most quality of care concerns fall outside this limitation. Therefore, although administrative exhaustion should be recognized as a consideration, residents can overcome this obstacle by limiting their suits accordingly.

3. Statutory Limitations on Damages

Another obstacle to class action certification involves state statutory limitations on damages.¹¹⁹ Class action plaintiffs

115. A recent Colorado case addressed this particular issue. See *Salas v. Grancare, Inc.*, 22 P.3d 568 (Colo. Ct. App. 2001); see also Boerstler & Nolte, *supra* note 4, at 93–95 (discussing *Salas*). In this case, nursing home residents sought to recover government benefits based on inadequate care in the nursing home. The Colorado Court of Appeals held that these residents were not required to exhaust administrative remedies under the Medicare or Medicaid Acts before proceeding on their tort claims. See *Salas*, 22 P.3d at 568–72.

116. The doctrine of exhaustion of administrative remedies requires parties to pursue available statutory administrative remedies before filing suit in district court. See *Heckler v. Ringer*, 466 U.S. 602, 605–06 (1984).

117. See *Salas*, 22 P.3d at 573 (a claim “arising under” the Medicare Act includes any claim “inextricably intertwined with a claim for benefits.”).

118. See *id.*

119. See, e.g., COLO. REV. STAT. § 13-21-102.5(2)(b)–3(c) (2000).

seeking monetary damages may be greatly constrained by such limitations if their suits are based on medical malpractice or wrongful death claims. In Colorado, for example, damages may be limited to two hundred fifty thousand dollars if they include "noneconomic loss[es] or injur[ies]."¹²⁰ Consequently, class action plaintiffs faced with these constraints may want to consider alternative remedies, such as injunctive relief and breach of contract entitlements, in addition to pursuing suits for noneconomic loss or injury.

Despite these potential external obstacles and limitations, class action litigation still remains a viable option for aggrieved residents. Avoiding tort-based claims and seeking alternative remedies may overcome these obstacles. Notwithstanding these obstacles, however, the benefits of class action litigation warrant consideration. The advantages of impact litigation may spawn the necessary impetus to change societal perspectives and thus improve present-day standards of care in nursing homes. The feasibility of class action litigation, however, depends upon the accessibility of alternative claims.

IV. CLASS ACTION SUCCESS WITH THE USE OF ALTERNATIVE THEORIES

Class actions, though important, do present obstacles. Despite the obstacles, impact litigation presents enormous opportunities for aggrieved nursing home residents because it will bring national attention to nursing home issues. In order to ensure this availability of class actions, residents should be aware of alternative remedies and claims of relief that may make the certification obstacles null and void.

120. *See id.* § 13-21-102.5(3)(a) ("In any civil action in which damages for noneconomic loss or injury may be awarded, the total of such damages shall not exceed the sum of two hundred fifty thousand dollars, unless the court finds justification by clear and convincing evidence therefor."). Noneconomic losses or injuries refer to nonpecuniary harm for which damages are recoverable by the person suffering the direct or primary loss or injury, including pain and suffering, inconvenience, emotional stress, and impairment of the quality of life. *See id.* § 13-21-102.5(2)(b).

A. *Shifting the Focus Away from Tort Claims*

Tort-based claims present problems for residents because of the individualized-injury focus. Certification may be feasible in the nursing home setting if the class action suit avoids such claims. Imposing liability on a plan or institution rather than individual tortfeasors will force courts, parties, and attorneys to focus more on the entity's practices than on the actions of any individual caregiver.¹²¹ In this way, more people may be said to be victims of the activity in question, and class actions may arise more naturally, thereby avoiding the obstacles of class certification.¹²²

Class action plaintiffs should avoid claims based on individual injuries and instead focus on the nursing home's failings for *all* its residents. One commentator noted, "[r]eceipt of treatment in larger, integrated settings with a cost-containment focus fosters conditions ripe for the emergence of class actions. Administrators make more decisions on a global basis, in accordance with guidelines that affect large groups of people in virtually the same way."¹²³ In the nursing home context, it is more likely that a particular home will use form documents and standardized procedures.¹²⁴ Class actions can focus on these entity-wide documents or practices, thus increasing the potential for certification and avoiding the individualized-injury problems.

Three feasible options for this change in focus from tort-based claims include contract claims, claims under Residents' Bills of Rights, and claims under state statutes.¹²⁵ Suits for injunctive or declaratory relief are also viable alternative options for nursing home residents.

121. Kathy L. Cerminara, *The Class Action Suit as a Method of Patient Empowerment in the Managed Care Setting*, 24 AM. J.L. & MED. 7, 32-33 (1998).

122. See *id.*

123. *Id.* at 33; see also William M. Sage, 'Health Law 2000': *The Legal System and the Changing Health Care Market*, HEALTH AFFAIRS, Fall 1996, at 9, 17 (noting that as health care systems become more corporate-like, delivery practices become more uniform and less patient-specific).

124. See Cerminara, *supra* note 121, at 33.

125. See Douglas et al., *supra* note 63, at 470-76, for a discussion of these causes of action.

1. Contract Actions

Nursing home class actions based on breach of contract have the potential to succeed and thus impact the quality of care in resident facilities. Courts that have analyzed such claim focus on admission agreements as well as implicit contractual agreements.¹²⁶

For example, in *Francis v. Health Care Capital, Inc.*,¹²⁷ the daughter of a nursing home resident sued the facility, claiming that a nursing home provided negligent care that ultimately led to the death of her father.¹²⁸ Her breach of contract claim alleged that the nursing home contracted with her to provide "reasonable nursing home care . . . with adequate medical, nursing and custodial care" for her father and then failed to do so.¹²⁹ The admission agreement served as the contract entered into by the parties.¹³⁰ In consideration for this care, the plaintiff's father paid the nursing home roughly \$1,880 per month. The court determined there was privity of contract between the parties in this case and allowed the plaintiff to maintain this breach of contract claim.¹³¹ This example illustrates the possibility of breach of contract class actions against nursing homes. Although this was an individual lawsuit, a breach of contract claim is also appropriate and applicable in the class action setting.

Breach of contract claims will more likely succeed if premised on express contracts between the resident and the nursing home, rather than on medical malpractice theories.¹³² Even

126. See, e.g., *Free v. Franklin Guest Home, Inc.*, 397 So. 2d 47 (La. Ct. App. 1981) (holding breach of contract claim cognizable in action based on injuries allegedly resulting from nursing home's negligence where tort action barred by statute of limitations, even though express provisions of contract added nothing to home's general duty of care).

127. 933 F. Supp. 569 (E.D. La. 1996).

128. *Id.* at 570.

129. *Id.* at 571.

130. *Id.*

131. *Id.* at 572 (determining that the nursing home chose to enter into an express contractual obligation and should be liable for any breach of that contract which might have occurred); see also *Petre v. Living Centers-East, Inc.*, 935 F. Supp. 808 (E.D. La. 1996) (holding that Admission Agreement served as basis for breach of contract claim).

132. *McIntyre v. Transitional Health Servs.*, No. 2:96CV00424, 1998 U.S. Dist. LEXIS 13965, at *13 (M.D. N.C. May 20, 1998) (holding nursing home resident's breach of contract claim was viable because it was not based upon medical malpractice, but rather an actual contract between the patients and the facility).

though "admission agreements rarely contain express terms requiring a facility to provide patients with a particular quality of care[.]"¹³³ there are still ways for class action plaintiffs to maintain viable contract claims. For instance, plaintiffs could support their breach of contract claims with breach of good faith and fair dealing claims.¹³⁴ Additionally, "courts could rule that admission agreements implicitly incorporate state licensing and Medicaid standards."¹³⁵

Another possibility is a claim of an implicit "warranty of adequate care and treatment" guaranteeing residents a certain level of care and services.¹³⁶ This claim would ease class certification because it avoids the problematic "individualized injury" assessment that tort actions involve. Rather, the focus is on the basic level of care guaranteed to all patients. For example, a recent Colorado class action case succeeded in a thirty million dollar settlement based on the nursing home's failure to deliver quality care as promised.¹³⁷ Therefore, breach of contract may prove to be a viable alternative basis for nursing home class actions.

2. Actions Under Residents' Bill of Rights

Under federal regulations, all nursing homes are required to have written policies relating to residents' rights.¹³⁸ These policies should include, at a minimum, the following rights:

1. Right to Be Informed of Your Rights and the Policies of the Home;
2. Right to Be Informed About the Facility's Services and Charges;

133. Douglas et al., *supra* note 63, at 470 (citing Patricia A. Butler, *Assuring the Quality of Care and Life in Nursing Homes: The Dilemma of Enforcement*, 57 N.C. L. REV. 1317 (1979)).

134. See *McIntyre*, 1998 U.S. Dist. LEXIS 13965, at *14.

135. Douglas et al., *supra* note 63, at 471.

136. *Id.*; see also *Guerin v. N.H. Catholic Charities, Inc.*, 418 A.2d 224, 227 (N.H. 1980) (holding that the defendant home violated an implied contract to "provide suitable board, room and nursing and medical care").

137. See Allison Sherry, *Suits Spotlight Nursing Home Abuse; Families Are Becoming More Attuned to Issues of Neglect, Experts Say*, DENV. POST, Feb. 9, 2001, at B1.

138. The Residents' Bill of Rights is promulgated under 42 U.S.C. § 1395i-3(c).

3. Right to Be Informed About Your Medical Condition and Treatment;
4. Right to Participate in Planning Your Care and Medical Treatment;
5. Right to Choose Your Own Physician;
6. Right to Manage Personal Finances;
7. Right to Privacy, Dignity, and Respect;
8. Right to Personal Possessions;
9. Right to Be Free from Abuse and Restraints;
10. Right to Voice Grievance Without Retaliation;
11. Right to Be Discharged or Transferred Only for Medical Reasons;
12. Rights of Access.¹³⁹

States have also established Residents' Bills of Rights as part of their state licensing procedures.¹⁴⁰ Nursing home claimants could litigate class actions under either federal or state bills of rights promulgations.

Some courts have determined that statutory provisions allowing for Residents' Bills of Rights provide for claims of breach of these provisions. In *Beverly Enterprises Florida, Inc. v. Knowles*,¹⁴¹ a Florida court determined that a personal representative of a deceased nursing home resident could bring an action against a nursing home for violation of a Residents' Bill of Rights when the deprivation or infringement of the resident's rights caused the patient's death.¹⁴² Therefore, class action litigation under Residents' Bills of Rights might be a means to promote the improvement of the quality of care in nursing homes.

3. Actions Under State Statutes

In addition to claims based on breach of contract and Residents' Bills of Rights, nursing home residents could pursue litigation based on other state provisions concerning nursing

139. For a general analysis of these rights, see Assoc. for Protection of the Elderly, *Nursing Home Resident's Bill of Rights*, at <http://www.aepeape.org/bill-rights.html> (last visited Apr. 2, 2002).

140. Douglas et al., *supra* note 63, at 472 (citing FLA STAT. ANN. § 400.022 (West 1976); N.Y. PUB. HEALTH LAW § 2803-c (McKinney 1975); TEX. HUM. RES. CODE ANN. § 102.003 (Vernon 1983)).

141. 766 So. 2d 335 (Fla. Dist. Ct. App. 2000).

142. See *id.*; see also FLA. STAT. ANN. § 400.023 (West 2002).

homes.¹⁴³ Several states have explicitly recognized the importance of litigation for nursing home residents. These states have enacted statutes guaranteeing nursing home residents a statutory cause of action.¹⁴⁴ For example, the Florida legislature enacted a statute that provides for the civil enforcement of the rights of nursing home residents.¹⁴⁵ The statute provides a cause of action for a nursing home resident to sue any nursing home licensee for a violation of the resident's enumerated rights.¹⁴⁶ Punitive damages may also be awarded under this statute for extreme violations.¹⁴⁷

The California legislature has provided a similar statutory cause of action. Under California's Elder Abuse and Dependent Adult Civil Protection Act, an elderly abuse victim is entitled to a civil cause of action.¹⁴⁸ The legislature provided abused and neglected elders with this statutory cause of action because it found that "cases of abuse . . . are seldom prosecuted as criminal matters, and few civil cases are brought in connection with this abuse due to problems of proof, court delays, and the lack of incentives to prosecute these suits."¹⁴⁹ Although litigation may prove problematic in the nursing home context, the statute provides an important opportunity for residents to achieve redress for violations of their rights.

State courts have also recognized private rights of action for nursing home residents. In *Gibson v. Monroe Manor Nursing Home*,¹⁵⁰ for example, the Louisiana Court of Appeals determined that claimants have a private right of action based on their status as nursing home residents.¹⁵¹

143. Douglas et al., *supra* note 63, at 475.

144. See, e.g., ARIZ. REV. STAT. ANN. §§ 46-455-456 (West 2001); FLA. STAT. ANN. § 400.023(1) (West 2002); MO. ANN. STAT. § 198.067 (West 2002); OR. REV. STAT. § 124.100-.140 (2001).

145. See FLA. STAT. ANN. § 400.023 (West 2002).

146. See *id.* ("Any resident whose rights as specified in this part are violated shall have a cause of action."); see also Payton Health Care Facilities v. Campbell, No. 85-560, 1986 Fla. Dist. Ct. App. LEXIS 8323, at *3 (June 11, 1986).

147. See *First Healthcare Corp. v. Hamilton*, 740 So. 2d 1189, 1197 (Fla. Dist. Ct. App. 1999).

148. See CAL. WELF. & INST. CODE § 15600 (Deering 2001).

149. See *id.* at § 15600(h); see also John W. Bellflower, Jr., Comment, *Respecting Our Elders: Can Tennessee Do More to Protect Its Elder Population from Institutional Abuse and Neglect?*, 66 TENN. L. REV. 819, 836 (1999).

150. 756 So. 2d 583 (La. Ct. App. 2000).

151. *Id.* at 585.

[P]ersons residing within nursing homes are isolated from the community and often lack the means to assert their rights as individual citizens. [There is a] need for these persons to live within the least restrictive environment possible in order to retain their individuality and some personal freedom. It is therefore the intent of the legislature to preserve the dignity and personal integrity of residents of nursing homes through the recognition and declaration of rights safeguarding against encroachments upon nursing homes residents' right to self-determination.¹⁵²

A resident's private right of action not only benefits the individual resident who brings the action, but it indirectly benefits all nursing home residents. Further, it provides a disincentive for facilities to violate residents' rights.¹⁵³ These examples of legislative and judicial rules affording a nursing home resident with the right to sue reasserts the value of litigation as a means to quality care. Class action claimants should consider the potential for these kinds of actions under state statutes.

B. Injunctive and Declaratory Theories

Injunctive and declaratory relief may also be available to class action plaintiffs instead of tort causes of action. Rule 23(b)(2) allows certification when "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."¹⁵⁴ Because residents seeking these types of relief want to change rather than preserve the status quo, they have the burden of proving that their sought-after relief will serve the public interest.¹⁵⁵ This proof will not be difficult to achieve, however, because the status quo is truly in dire need of alteration and because, ultimately, every citizen is at risk.

A few courts have analyzed the viability of nursing home class action injunctive and declaratory demands.¹⁵⁶ In *House v.*

152. *Id.* (quoting LA. REV. STAT. ANN. § 40:2010.6 (West 2001)).

153. *Id.* at 585-86.

154. FED. R. CIV. P. 23(b)(2); *see also* Davenport v. Gerber Prods. Co., 125 F.R.D. 116, 120 (E.D. Pa. 1989).

155. *See* Martin v. Int'l Olympic Comm., 740 F.2d 670, 675 (9th Cir. 1984).

156. *See, e.g.,* Brown v. Giuliani, No. 98 Civ. 7743, 2000 U.S. Dist. LEXIS 8889, at *16 (S.D.N.Y. June 28, 2000) (class certification sought for purposes of

Hillhaven,¹⁵⁷ class action plaintiffs sought declaratory relief against the Department of Health and Human Services as well as the nursing home. Plaintiffs sought a declaration that the nursing home failed to provide care, conditions, and treatment in accordance with federal Medicare and Medicaid standards.¹⁵⁸ Plaintiffs also sought preliminary and permanent injunctions requiring nursing home owners to "properly monitor conditions, treatment, and care at the nursing home."¹⁵⁹ Ultimately, this suit ended in settlement, as the court determined declaratory and injunctive relief were not warranted because the defendant "nursing home was in substantial compliance with laws and regulations."¹⁶⁰ This result, however, suggests that relief may be justified with evidence that the defendant nursing home does not comply with regulatory standards of care. If nursing home residents can prove that a facility fails to comply with essential licensing requirements, injunctive relief may be available to restrain operation of the facility.¹⁶¹ Thus, class action plaintiffs should seek similar injunctive and declaratory judgments if their nursing homes fail to adhere to these standards.

Class actions based on injunctive and declaratory grounds may have a stronger chance for certification than suits seeking monetary awards. This point was evident in *Feld v. Berger*.¹⁶² Even though the court in *Feld* ultimately denied class action certification, the court concluded that the plaintiffs were entitled to an injunction restraining the defendant Department of Social Services from "transferring them without following the required procedures."¹⁶³ This case illustrates the potential of injunctive litigation for remedying conditions at nursing homes. A court may view injunctive relief favorably because injunctions will halt practices harming residents.

obtaining declaratory and injunctive relief); *House v. Hillhaven, Inc.*, 412 S.E.2d 893 (N.C. Ct. App. 1992) (class action seeking declaratory and injunctive relief, alleging the nursing home's failure to provide adequate nursing care).

157. 412 S.E.2d 893 (N.C. Ct. App. 1992).

158. *Hillhaven*, 412 S.E.2d at 894-95.

159. *Id.* at 895.

160. *Id.* at 896.

161. See John P. Ludington, Annotation, *Licensing and Regulation of Nursing or Rest Homes*, 53 A.L.R. 4th 689, 780 (2001).

162. 424 F. Supp. 1356 (S.D.N.Y. 1976).

163. *Id.* at 1364.

States have also responded favorably to nursing home claims seeking injunctive relief. For example, section 50.10 of the Wisconsin statutes explicitly allows nursing home residents a private right of action.¹⁶⁴ The statute limits claims to actions for "mandamus against the state enforcement agency, the Department of Health and Social Services (DHSS), or injunctive relief against DHSS or the nursing home," however.¹⁶⁵ Thus, Wisconsin recognizes the importance of these claims.

Injunctive or declaratory theories of relief may also be employed in claims based on state general consumer protection laws. If a nursing home does not "provide the quality of care it has explicitly or implicitly guaranteed, it may well be acting in violation of state consumer protection laws, which are specifically designed to protect consumers."¹⁶⁶ In *Salas v. Grancare*, the Colorado Court of Appeals recognized the viability of claims under the Colorado Consumer Protection Act.¹⁶⁷ The court stated that "[S]tate attorneys general have employed [these] laws to obtain injunctive orders prohibiting nursing home operators from continued violations of state and federal standards."¹⁶⁸ Nursing home residents should look to these laws as a viable option in the litigation process.

These examples illustrate the greater potential for success with alternative types of relief, and should be important considerations for nursing home claimants. Injunctive and declaratory remedies may provide immediate changes to processes and standards in the nursing home industry. This is important when one considers the make-up of the nursing home population. These elderly, often frail and ill, individuals would undeniably benefit from fast improvements. Moreover, the plaintiffs would be able to avoid the ambiguity of Rule 23(b)(3)'s "predominance inquiry" provision and instead seek certification under Rule 23(b)(2), the provision permitting class actions for declaratory or injunctive relief.

164. WIS. STAT. § 50.10 (2001).

165. Jeffrey Spitzer-Resnick & Maya Krajinovic, *Protecting the Rights of Nursing Home Residents: How Tort Liability Interacts with Statutory Protections*, 19 NOVA L. REV. 629, 633 (1995) (citing WIS. STAT. § 50.10 (2001)).

166. See Douglas et al., *supra* note 63, at 476.

167. See Boerstler & Nolte, *supra* note 4, at 95.

168. Douglas et al., *supra* note 63, at 476 (citing *Bellotti v. Heritage Hill of Newton Retirement & Convalescent Home*, No. 78-4855 (Mass. Super. Ct. Sept. 25, 1978); *Texas v. Southwest Multiplex*, No. 271587 (Tex. Dist. Ct. Feb. 23, 1978)).

Though nursing home class action certification has proven problematic in the past, the obstacles can be overcome. Nursing home residents have options available in the class action arena. Creative alternative theories, such as breach of contract, Residents' Bills of Rights claims, state statute claims, as well as employing injunctive and declaratory demands, might elevate nursing home litigation to impact litigation status.

CONCLUSION

Class actions provide an alternative route for nursing home residents faced with substandard care and inexcusable living conditions. Past solutions embraced regulations as a means to improve the care in nursing homes. These regulations, both federal and state, have simply fallen short. The government has not proven to be the guardian it claims to be.

If the quality of care is to improve in nursing homes, the public needs to be informed about the real conditions facing nursing home residents. Shortsighted perspectives must change. The citizenry needs to know about nursing home realities in order to jumpstart the legislative process to enact different and more effective protections. Litigation is a solution, but individual suits have proven ineffective in providing this wake-up call. Creativity may prove to be the needed spark.

Class actions, an innovative litigation mechanism, will help bring nursing home concerns to the forefront of the reform convoy. Impact litigation, such as the class action lawsuit, will draw in necessary national attention and hopefully produce significant changes in nursing homes—improving the quality of life for each resident class member and deterring future abuse.

Over two million Americans celebrated their sixty-fifth birthdays in the year 2001. Each one deserves a good home.

