

MEDICAL MALPRACTICE REFORM & PASSING THE BUCK: *an elder advocate weight in*



Writer: Brenda S. Fulmer

As an attorney for 20 years and an elder advocate devoting my entire practice to the welfare, protection and safety of nursing home residents, I noted that conspicuously absent from the public debate is the conduct of a small yet prominent assemblage of large nursing home corporations who have cost the United States taxpayers countless millions of dollars.

Throughout the course of my practice I have represented many families including those whose loved ones have starved to death while they paid \$6,000 a month to highly profitable nursing home corporations. Loved ones who have become so dehydrated that they have required expensive, painful and degrading hospitaliza-

tions. Multimillion dollar facilities that spend less than \$5 per day on each resident to cover three full meals and two snacks. Nursing home residents who have been viciously beaten by staff members or fellow residents. Patients who have been so horrifically neglected that they have developed softball size bedsores in their backs so large and so deep that I have actually seen their spines from outside of their body. On each of these occasions, our investigations have revealed that the injuries and often deaths have occurred from corporate decisions made to save modest amounts of money and increase profits.

There are two very specific areas of the fallout of these irresponsible choices made by the corporations. The first is obvious. People suffer and die. The second is less so. Namely, in each of the circumstances I have described as a mere snapshot of some of the horrors I see in my practice, non-profit hospitals are forced to pick up the pieces and Medicare and Medicaid pay the bills for extensive treatment resulting from these choices. The costs are astronomical. In the end, it is you the taxpayer who bears the burden of lining the pockets of this small percentage of nursing home corporations who choose to act in this manner.

There is a further important item that is absent from the national debate. When lawyers take on these very difficult, time consuming and heart wrenching cases, they are obligated to act on behalf of the government to recoup those costs. For cases in which they prevail, they obtain recoveries from the nursing homes and their insurance companies to pay back the Federal govern-

ment for any treatment which is determined to have been caused by the negligent and irresponsible choices made by the nursing homes. As a whole, elder advocates who defend the rights of nursing home residents annually recoup millions of dollars every year for the Federal and State governments from these wrongdoers. Efforts are underway to obtain a specific accounting from the U.S. General Accounting Office to quantify these funds. I am confident that the number is extraordinarily significant and serves as a great benefit to taxpayers.

There is yet a third element to this debate that I have heard in the past but not recently. That involves Medicare and Medicaid fraud. I would reiterate that most nursing homes and their staff provide hon-

est, compassionate and devoted work to protect the most vulnerable citizens in our society. However, I have uncovered through review of public records a significant number of nursing homes wherein the owners place relatives in salaried positions at their nursing homes and ultimately bill Medicaid for the work that they are supposed to do. When I interview staff members, they have sworn under oath that these people have never shown up for their so-called positions. It is shocking that this still occurs at this late date in our history, although I have direct evidence that it does and has. This is not limited to my state of New Jersey. I have provided this information to the Attorney General's office on at least one case and greatly hope that action will be taken. As with the issues above, the fallout is both obvious and twofold. In the first instance, the absence of a paid individual charged with the care of nursing home residents not showing up for the job harms the residents. The second aspect is financial. Taxpayers are paying for individuals all over the State of New Jersey and elsewhere to perform tasks that they simply do not perform. This represents a dramatic waste of resources and, as noted above, inevitably leads to injury, whose treatment becomes the burden of taxpayers as Medicaid and Medicare pay for exorbitant hospital bills by non-profit hospitals. Ultimately, these non-profit hospitals and taxpayers indirectly fund the often record setting profits by some for-profit corporations in the nursing home industry.

A final thought. Supporters of tort reform have banded a new catch phrase on the political landscape – defensive medicine. This is not a medical term. Sadly, we are stuck with it. Solely because it is catchy. Its proponents suggest that physicians employ more testing than might be necessary to avoid lawsuits. Considering the fact that lawsuits occur only when there is a bad result, isn't defensive medicine defending against bad results? How callous to think that if the fear of lawsuits were eliminated, physicians and the insurance industry would WILLINGLY expose their own patients to an increased likelihood of injury or even death? Does anyone remember the Ford Pinto and the scores of people who died because Ford executive decided to save a few dollars on each of their Pinto's with an inexpensive placement of the gas tank? If the fear of lawsuits were eliminated, what they are telling us is that more people will be injured and die. Statistically speaking, this is certain. If the debate centers on money, what is the cost of scores of injured and dead people? Who picks up the cost? Non-profit hospitals? Parentless families? Medicare and Medicaid? Yes, you the taxpayer. Isn't this really about shifting costs, and dare we say passing the buck? I would suggest that increased human suffering is another byproduct of any possible reductions in so-called defensive medicine – though its proponents apparently do not see fit to place consideration of that tradeoff into the equation.

As this lively and often contentious debate ensues, I strongly believe that the wrongdoers in the otherwise essential and quality nursing home industry need to be investigated and addressed and the tradeoffs that we may face as a nation in favor of tort reform warrant serious reflection.

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settling a first party insurance claim: it must not be an adversarial process

Writer: Brent Adams

It is perfectly legal and acceptable for an insurance company to make a profit. That is the American way. There are a number of legitimate ways for an insurance company to increase its profits. An insurance company may decide to insure only the least risky events or property. It may refuse to write policies to cover the risks that it determines would not be profitable. It may refuse to issue policies to irresponsible or accident-prone individuals. It may elect to do business only with those policyholders who have the least claims experience. It may reduce its staff or employ new and more efficient technology. It may decide to increase its premiums. However, paying less than full value for a claim is not an acceptable or even legal way to increase its profits.

This discussion is limited to first-party insurance claims, which involve a claim against an insurance company arising out of an insurance policy in which the claimant is the named insured. Different rules may apply to insurance companies handling claims made against a negligent party who is insured by the insurance company. Those claims are commonly referred to by lawyers as third-party claims. Because the claimant in a third-party claim does not have a direct contractual relationship with the insurance company, most states give greater latitude to these insurance companies. Hardball negotiating tactics are usually allowed.

With respect to first-party insurance claims, most claim adjusters will agree that the insurance company must treat the interest of the insured the same as their own interest and that the process of adjusting a claim is not adversarial. Whether a particular adjuster agrees with that rule or not, it is the law in virtually every state. Further, the rule is universally recognized in every insurance industry text and claims manual in the United States. What this means is that the insurance companies are not allowed to pay less than the value for a claim. Of course, reasonable minds can differ as to the specific amount of a claim. However, if an insurance company disagrees with the policyholder concerning the value of a claim, it must be an honest disagreement based on accurate facts and honest reason.

To pay less than the full value of the claim is a violation of fair claims practices and, in most states, could give rise to punitive damages or other extra contractual damages. The only thing an insurance company sells is promises. The law requires that insurance companies fulfill their promises to their policyholders and will not allow them to pay less than the full value of a claim. All claims must be paid in full regardless of whether the insurance company makes a profit.

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